87-2129

No. _____

IN THE

Supreme Court of the United States

October Term, 1987

In the Matter of
THE HONORABLE THOMAS A. WHITE,
Judge of the Court of Common Pleas
of Philadelphia County,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT

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Questions Presented

Whether Canons 1, 2, & 5(c)(1) of the Pennsylvania Code of Judicial Conduct and Section 17, Article V of the Pennsylvania Constitution are unconstitutional under the Fourteenth Amendment as applied to appellant.

Whether Rule 24 of the Judicial Inquiry and Review Board violates the federal Constitution both on its face and as applied because it permits severe and irreparable effects upon the accused's interests without assuring any prompt hearing and disposition and because it is an *ex post facto* law or bill of attainder.

Whether the penalty of removal of an elected judge constitutes a violation of due process in that it is excessive and disproportionate in breach of cruel and unusual punishment and equal protection standards.

Whether the Pennsylvania Supreme Court deprived appellant of due process by relying upon findings of a legally biased tribunal.

Parties to Proceeding

The parties to the judicial disciplinary proceeding below are the Honorable Thomas A. White and the Judicial Inquiry and Review Board, represented by their General Counsel, Robert L. Keuch.

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JURISDICTIONAL STATEMENT

Reference to Opinions Below

The Opinion of the Pennsylvania Supreme Court is reported at 538 A.2d 473 (Pa. 1988), and is included in the Appendix. The Final Report of the Judicial Inquiry and Review Board is unreported, but also appears in the Appendix.

Grounds on Which Jurisdiction is Invoked

1. The proceeding below was a disciplinary action arising out of allegations of judicial misconduct. It was commenced by the Judicial Inquiry and Review Board of Pennsylvania and was decided by the Pennsylvania Supreme Court. This appeal is from the order of the Pennsylvania Supreme Court.

2. The date of the order of the Pennsylvania Supreme Court presented for review is February 25, 1988. Appellants Application for Reargument was denied on March 29, 1988.

3. Appeal jurisdiction is conferred upon this Honorable Court by 28 U.S.C. §1257(2). The "statutes" being challenged are Canons 1, 2, and 5(c)1 of the Code of Judicial Conduct, as applied to Appellant; Article 17, section 5 of the Pennsylvania Constitution as applied to Appellant; and Rule 24, of the Rules of Procedure Governing the Judicial Inquiry and Review Board, on its face and as applied to Appellant.

Statutes Involved

Fourteenth Amendment, U.S. Constitution;

Rule 24, Rules of Procedure governing JIRB;

Canons 1, 2, and 5(c)(1) of the Pennsylvania Code of Judicial Conduct; of the Judicial Inquiry and Review Board;

Article V §17 of the Pennsylvania Constitution

[Reproduced in the Appendix]

Statement of the Case

This is a case in which an honorable veteran judge of the Philadelphia Court of Common Pleas was removed from his elected judicial post because of the manner in which he discarded an unwanted $300 cash Christmas gift which was in any event duly reported to the Court Administrator in a state which has no rule against gifts to judges.

The discipline administered to Appellant, the Honorable Thomas A. White, was part of a group dismissal of state trial judges in Pennsylvania. The unprecedented removal of eight judges in February of 1988 came amidst newspaper charges that judges were taking payoffs from the Roofers' Union, Local 30-30B, [hereinafter "Roofers"] in exchange for judicial favors. The intense pressure created by the sensational publicity drew an immediate and sweeping reaction from the state's Judicial Inquiry and Review Board [hereinafter "Board"] and the Supreme Court of Pennsylvania. In an atmosphere pressurized by a major newspaper clamoring for action, both the Board and the Pennsylvania Supreme Court delivered the administrative equivalent of capital punishment. It was in this setting that Judge White who received no "payoff," who merely ridded himself of a gift which he could not practically return, and who was never even alleged to have given judicial favors to anyone, became caught in someone else's tangled web.

This case tests not only important principles of procedural due process in a state's administration of professional discipline, but also the fundamental precept that justice may only be achieved upon a discriminating consideration of individual facts in individual cases, not upon a desire to purge those who stand condemned by an influential press.

The facts of this case begin with what the Board has described as a "federal labor racketeering investigation" conducted by the Federal Bureau of Investigation in the City of Philadelphia. The Investigation focused upon the activities of Steven Traitz, president of Roofers Union, Local 30-30B. According to reports, Traitz had conceived a plan to give small amounts of cash ($300-$500) to a number of Philadelphia judges as Christmas gifts. Wiretap evidence revealed that Traitz in some instances even connived from a few target judges scandalous promises of favors in return. This scheme was clearly separate from the Union's practice of making numerous campaign contributions to judges, including Justices of the Pennyslvania Supreme Court. Judge White, by contrast had never solicited or received any contribution from the Roofers' Union. He was also innocently unaware of Traitz' scheme. Just how unaware is made clear by the following narrative.

In December of 1985, near Christmastime, a man by the name of Thomas Brown appeared in the chambers of Judge White. Judge White knew Brown casually as a long-time court employee. The Judge curtly informed Brown that he had very little time. Brown responded that he just dropped by to wish the Judge a merry Christmas. Disarmed, the Judge acquiesced in a short conversation in his chambers. In the middle of that conversation, Judge White took a phone call. While engaged on the phone he noticed Brown placed on his desk what appeared to be a Christmas card. Brown said "Merry Christmas" and then left. Judge White did not open the envelope and did not again notice it on his work-cluttered desk until two or three days later when he discovered that it contained $300 in cash. He had only an indefinite thought then that Brown may have been working for the Roofers' Union. He did not, however, know how to contact Brown directly to return the gift

and he did not actually know if the money had come from the Union. With his heavy workload as a Motions Court Judge, having no specific rules to guide him, and embarrassed by the gift itself, Judge White resolved the matter by directing one of his assistants to take the money and purchase gift certificates for his staff and court personnel. This is what was done. It was not until after Judge White disgorged the gift that he ran into Brown and, for the first time, met Traitz at a public luncheon conducted by the Roofers' Union innocently attended by many judges, including the Chief Justice of the Pennsylvania Supreme Court.

To put Judge White's actions in perspective it is important to emphasize certain undisputed facts. It is undisputed that Judge White neither wanted nor enjoyed any personal benefit from the gift. It is undisputed that the gift certificates which he purchased were above and beyond the gifts which he customarily gave at Christmas, therefore precluding any suggestion of an indirect benefit. It is likewise undisputed that in Pennsylvania the Judicial Canons have omitted the *per se* prohibition against gifts which appears in the ABA's Canons and instead imposed a simple requirement to report all gifts in excess of $200 to the Court Administrator on an official form provided by the Court. The reporting requirement was indisputably satisfied in this case.

Early in 1986, leaks about a federal grand jury investigation into the Roofers' activities began to appear. As time went on these leaks turned into announcements of charges. On Friday, October 24, 1986, the *Philadelphia Inquirer* printed the following headline: *Roofers Union Leaders, 2 Judges Indicted in U.S. Bribery Probe: 21 charged in sweeping investigation.* The headline heralded three full pages of stories and pictures. The article revealed that the United States Attorney had announced indictments and that the Union's attorney in turn had accused the United States Attorney of creating

a "media circus." For the next few months the "Roofers" case became the most prominent matter in the press of Philadelphia, a one-newspaper town.

Among the articles and editorials in the *Philadelphia Inquirer,*[1] there appeared an editorial piece on November 8, 1986. It is excerpted as follows:

> The public must demand a judicial reform crusade
>
> Philadelphia—whose name once was synonymous with excellence in law—today stands shamed by charges of judicial corruption. Last month federal

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[1] During an approximately one month period, the following articles appeared in the *Philadelphia Inquirer:*

10/24/86: Roofers Union Leaders, 2 Judges Indicted in U.S. Bribery Probe—21 charged in sweeping investigation"
"Union, leader share common profile"
"Union lawyer assails 'media circus' "
"Hard look at union continuing"
"Judges blast withholding of names"
"The buying of influence: A portrait"
"Hobbs Act: The law in this case"
"Traitz and union share a profile: Combative, yet often charitable"

10/25/86: "Roofers and two judges enter pleas of not guilty"
"Mario Driggs: A rising star"
"Sylvester cast shocking to many who know her"
"1984 bribery alleged, but no judges listed gifts"

10/28/86: "Roofer chief ordered held until trial"

10/31/86: "Traitz: Will agree to surveillance in return for release"

11/2/86: "Taping of judges detailed"

11/5/86: "Traitz is ordered freed on bail—Judge delays his release to allow appeal"

11/7/86: "2 more indicted in Roofer probe—Ex-OSHA chief, former officer cited"

11/8/86: "2 deny charges in probe—Plead not guilty in Roofers case"
"The public must demand a judicial reform crusade"

11/15/86: "Pa. looking for possible violations of law or professional standards"
"Before the bar—the Roofers' money messenger enters a plea of guilty"

11/15/86: "Judges Named in Roofers Probe—11 said to take money"

> indictments detailed 55 incidents since 1983 in which Philadelphia judges and court employees allegedly took bribes from the Roofers' Union Local 30-30B.

On November 2, 1986, the *Inquirer* carried another editorial which bellowed the same theme:

> For Selling Public Trust, Judges Must be Removed
>
> There can be no compromise with the Philadelphia judges who accepted cash "gifts" from the Roofers Union. *All should be relieved of all judicial duties and should be forced to resign from office.* [Emphasis added]

This editorial specifically mentioned Judge White. It further stated:

> The tools of law enforcement have been turned on the Philadelphia courts and now the citizenry squirms at what it sees: *Corruption laid bare by body microphones, wire taps and informants.* [Emphasis added]

No effort was made to distinguish one judge's case from the other. All were proclaimed corrupt. The call went out for mass removal.

This tone having been set, another among the myriad of articles appeared on November 30, 1986—*Judicial Watchdog Faces its Biggest Case.* It explained how the machinery of the Judicial Inquiry and Review Board had been primed since March of 1986—when grand jury leaks first began to appear—to deal with the "Roofers cases." The article revealed significant information about the Board's plans and included the following revelation:

> Several months ago, the board asked the state Supreme Court to adopt a new rule permitting the JIRB to recommend rapid emergency suspensions of errant judges before time-consuming investigations and hearings are complete.

Confirming the prediction of this article, the Pennsylvania Supreme Court on December 5, 1986, enacted a new rule—Rule 24 of the Rules of Procedure Governing the Judicial Inquiry and Review Board. It became effective immediately. The Rule provided in part as follows:

> (a) Incident to a preliminary investigation conducted pursuant to Rule 1 of these Rules or during a formal proceeding conducted pursuant to Rule 2 of these Rules, *the General Counsel, with the concurrence of a reviewing member* of the board [as selected by the Board], may, upon their determination that the continued service of a judge is causing immediate and substantial public harm and an erosion of public confidence to the orderly administration of justice, which conduct appears to them to be a violation of the Code of Judicial Conduct or the Rules Governing Standards of Conduct of District Justices, petition the Supreme Court for injunctive or other appropriate interim relief, including temporary suspension or reassignment of the judge.[2] [113a (emphasis added)]

The obvious genesis of the rule was the desire to allow prehearing suspensions of those very judges whose removal had been categorically demanded by the press for their involvement with the Roofers.[3]

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[2] The Rule also provided in part as follows:

> (c) Within ten days after such service, the respondent-judge may file an answer to the petition with the Supreme Court and General Counsel for the Board.
>
> (d) Following the ten-day response period, and after consideration of such response, the Supreme Court may issue such orders to the respondent-judge as may be necessary. Such orders of the Supreme Court may require temporary suspension of performance of judicial duties by the respondent-judge or such other relief as may be deemed appropriate pending further definitive action under Rules 1 and/or 2 of these Rules. [Emphasis added]

[3] Section "i" Rule 24 undertook to preserve the confidentiality of all judicial disciplinary proceedings until such time as a post-hearing final recommendation is made:

(Footnote continued on following page.)

On December 12, 1986, seven days after the rule was passed, the Board, like clockwork, issued its first formal charges against Judge White. Those charges are in pertinent part as follows:

> Specifically, the Board charges that Respondent has violated Canons 1, 2, and 5(c)(1) of the Code of Judicial Conduct, . . . in that:
>
> In the years 1984 and 1985, the Respondent accepted cash gifts from a representative of the Roofers Union, Local 30-30B and
>
> That, despite the fact that the cash gifts referred to in the preceding paragraph were in amounts which would require reporting on Respondent's financial disclosure forms for the years 1984 and 1985, . . . the Respondent failed to report the receipt of such a gift on his financial disclosure form for the year 1984.

The charge of an unreported gift in 1984 was eventually abandoned and is not now at issue. The charge relating to a gift in 1985 was, however, pressed by the Board.

On December 19, 1986, the Board filed with the Supreme Court of Pennsylvania its Petition for Interim Relief pursuant to the new Rule 24. This Petition sought a prehearing suspension and alleged that

> the continued service of Respondent Thomas A. White as a Judge is causing immediate and substantial public harm and an erosion of public confidence to the orderly administration of justice as a result of *conduct which, in the judgment of the Board and the General Counsel, violates the Code of Judicial Conduct.* [Emphasis added]

(Footnote continued from preceding page.)

> (i) . . . *All papers filed with, and proceedings before, the Board and Supreme Court under this Rule shall be, and remain, confidential* but shall be made part of the record which may be filed with the Supreme Court as contemplated in Rule 20 when the Board takes final action in a matter as provided in Rule 16 of these Rules. [Emphasis added]

The Petition recited that this determination had been made jointly by the Board and General Counsel. This official declaration that Judge White violated the Code of Judicial Conduct was noticeably unqualified by any reference to mere possibility or probability. It was an outright decree that a violation had occurred. The Board, an arm of the state's highest judicial body, thus put as much distance as possible between the court system and the publicized charges of judicial misconduct. In doing so, however, it flew headlong into a premature finding of guilt.

The Memorandum accompanying the Board's Rule 24 Petition for suspension presented the grounds for its dramatic and unanimous prehearing judgment that a violation of the Judicial Code had taken place.

First, the Memorandum referred to a "sixty-one count indictment charging 19 individuals associated with Roofers' Union Locals," and made mention of the allegation that "kickback" money was used to pay cash to fifty federal, state and local public officials. Although figuring prominently in the Memorandum, this allegation had nothing to do with Judge White who was not accused of any involvement in or knowledge of that scheme.

Second, the Board's Memorandum referred to the public's negative reaction to publicity. That was gauged by two sources: the comments of the Chancellor-elect of the Philadelphia Bar Association that "the public was losing confidence in the court system"[4]; and the "Philadelphia Inquirer editorial of November 21, 1986, stating that allowing the judges who had received cash from the Union was resulting in the public's loss of confidence in the judicial process." Thus, the very editorial which named Judge White and which advanced

[4] Ironically, this Chancellor was a member of the very Philadelphia Bar Association Committee on Retention of Judges which voted to endorse Judge White's retention even after the Board recommended his removal.

a demand for indiscriminate removal was actually used as evidence in bringing about the prehearing suspension and a premature finding of misconduct.

Third, the Board's Memorandum declared that Local 30-30B of the Roofers Union was an organization with a bad reputation because of a history of labor violence. No evidence was offered that Judge White knew of the union's reputation, nor was any reference made to the fact that many elected officials, including Senators, Congressmen, judges, and Justices of the Pennsylvania Supreme Court, had traditionally received lawful campaign contributions from that organization. No notice had ever been issued to any judge that the Roofers Union, which engaged in Boys Club and other charitable activities, was in itself anathema. The reference to the Union's reputation was obviously designed to prove that in a state which did not prohibit gifts to judges receiving a gift *from the Roofers* was still in itself reprehensible.

The Memorandum also revealed that the Board had been unanimous in requesting the immediate prehearing suspension of Judge White. Contrary to section "a" of its own hurried Rule 24, the Board decided not to let an individual Board member (who could later recuse himself from final proceedings) make the preliminary Rule 24 determination based on an *ex parte* review of the evidence. Instead, the whole Board elected to disregard Rule 24(a) and to become contaminated by a review of all "evidence," including patently prejudicial and inadmissible matter. In this case the hearing was over before it ever began.

On December 23, 1986, the *Philadelphia Inquirer* issued another editorial: *The judges cannot defend acceptance of Roofer cash.* It stated in part:

> The judges implicated in the Roofers investigation cannot sit in judgment of others. *They must be removed.* While the loss of their services will be a

> staggering blow to an already overloaded court system, allowing them to remain erodes the most fundamental principle of justice in this country: that all are equal in the eyes of the law. [Emphasis added]

On January 30, 1987, Judge White was summarily suspended with pay by the Pennsylvania Supreme Court. Notwithstanding that the state law requirements of confidentiality still applied to the pre-hearing suspension, the Court's Order suspending Judge White was accessible to the press. The taint of prejudice was darkened further by a process which (1) produced an unnecessary declaration of actual guilt without a hearing, and (2) relied *ex parte* and without restriction on evidence of the Roofers indictments, tapes of conversations not involving Judge White, and other scandalous matters having no bearing on the facts of Judge White's case. To quell the outcry of the press, the Board and the Pennsylvania Supreme Court had undertaken to perform a "clean sweep" which, for all its expediency, necessarily overlooked individual facts, individual rights, and individual justice.[5]

On March 11, 1987, a hearing was finally held. At this hearing a Board panel, consisting of three of the nine Board members who had already pronounced Judge White guilty and reviewed all of the raw evidence *ex parte*, served as the only "factfinders" who heard live testimony. Only these three panel members, therefore, could weigh credibility. In circumstances where broad

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[5] On January 20th the Board amended its charges to include the following allegation:

> On or about February 12, 1986, Respondent was interviewed by an agent or agents of the Federal Bureau of Investigation and in response to questions concerning his receipt of cash payment from a representative of the Roofers Union Local 30039B [sic] he provided false information.

In fact Judge White answered each FBI question truthfully, if narrowly and specifically. He had not been handed cash. He discovered cash in an envelope two or three days after it was left on his desk. He later volunteered to testify before a grand jury and did so fully.

allegations were raised against numerous judges, credibility judgments of witnesses in individual cases became extremely important. At the hearing Judge White testified openly and strongly to his innocent state of mind. An array of leading members of the Bar and business community also testified personally and by affidavit to Judge White's integrity, ability, and qualifications. No contrary testimony was presented.

The hearing itself was characterized by several unique developments. One was the deferral of all evidentiary rulings until the full Board convened *after* the hearing. As a result, the hearing panel let into evidence virtually everything which Board Counsel as prosecutor wanted to introduce. This included newspaper articles unconnected to Judge White and supposedly showing the reputation of the Roofer's Union. More significantly, it included electronic surveillance tapes of conversations in which Judge White took no part. Evidence was even received of the scheme by which Steve Traitz obtained kickback money for use as payments to judges. Because there was never any evidence whatsoever of any knowledge by Judge White of the newspaper articles, the contents of the surveillance tapes, or the kickback scheme, their unqualified admission was gravely prejudicial.

On August 4, 1987, the Board issued its Final Report and Recommendation calling for Judge White's removal from office and his disqualification from any future judicial office. The Board acknowledged that it had considered the tapes of conversations between Traitz and others, conversations in which Judge White had not taken part. Those tapes included the extremely prejudicial conversations to which Judge White was never a party, and which he could never cross-examine. There were literally hundreds of taped conversations presented to the Board in which violence by the Union was discussed and in which some judges engaged in truly compromising discussions. There was no evidence of involvement of Judge White in any of these poisonous discussions and yet they were presented to the Board as evidence in his case.

Thus, hearsay talk among criminals about a public official who was not even present was used to convict the public official of wrongdoing.

The Board's Report was delivered to the public's doorstep via the *Philadelphia Inquirer*. The Report had been released before a general election in which Judge White was running to retain his elected judicial office for another ten years. After all the considerable adverse press publicity, the voters of Philadelphia in exercising their constitutional rights under Article V, Section 13 of the Pennsylvania Constitution still *voted to retain Judge White* in his judicial position by a resounding margin.[6] The public saw through the haze of accusations.[7] Judge White placed second in popular votes among all the Court of Common Pleas judges who were seeking retention in Philadelphia.

On February 25, 1988, the Supreme Court of Pennsylvania issued its decision in one Opinion addressing eight consolidated cases. It confirmed the Board's recommendations of removal in all eight instances except that two of the judges, William J. Porter and Thomas Dempsey, were apparently permitted to return to the bench upon the possibility of some

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[6] The Supreme Court's Opinion at 32 erroneously states that Judge White "is a member of the Court of Common Peas of Philadelphia County having been elected to a ten-year term commencing in January 1978." In fact that term had ended and Judge White had been certified, sworn in, and commissioned for a new term even after the argument before this Court on the voters' informed choice to retain him.

[7] Judge White had also received endorsement from the local Bar committee on retention of judges and a plebiscite of its members. It is significant in this regard that neither the Pennsylvania Supreme Court nor the Board took any action to disqualify Judge White from appearing on the ballot despite the suspension without hearing, despite the Board's prehearing declaration that he had violated the Canons, and despite the filing of the Board's highly critical Report and Recommendation. It is significant, too, that Judge White had been certified, sworn in and commissioned by the Governor without opposition by the Board or Court for two new ten year terms in January, 1988.

future election. Ironically, in those cases, the Judges had offered no reason at all for accepting for personal use the cash gift from the Roofers.

The Pennsylvania Supreme Court's Opinion dealt only briefly with the particulars of Judge White's case. For convenience, however, that reference is excerpted here:

> Judge White first contends that he did not accept the cash for his own use, and therefore his conduct was not prohibited. He claims that Brown left an envelope containing the cash on his desk without his knowledge. Upon his discovery of the cash several days later, he had it converted to gift certificates which he then distributed to his office personnel. He attempts to distinguish his case from the other judges who he argues converted the Roofers' money to their own use. This contention is obviously specious. *When one accepts a dominion over property that is offered and makes a judgment as to its disposition, it is of no consequence how he chose to use it.* [28a-29a (emphasis added).]

Curiously, the court hinged its removal sanction against Judge White on the technical acceptance of the cash gift which Judge White only discovered two days after the envelope had been dropped on his desk. Notwithstanding that Judge White disgorged the cash contents by directing their distribution to court employees and thereby ridding himself of an indisputably unwanted gift, the Court decreed flatly that "[w]hen one accepts a dominion over property that is offered and makes a judgment as to its disposition, it is of no consequence how he chose to use it."

With respect to the secondary charge of making "*false*" statements to the FBI, the Court in essence agreed with Judge White by describing his statements as "[t]ruthful perhaps, but still misleading." The Court did not credit Judge White's thoroughness in his voluntary federal grand jury testimony or his immediate offer to be re-interviewed by the FBI to correct any misimpression.

The Supreme Court of Pennsylvania was also very conscious of the claims of procedural irregulatiries before the Board, particularly the intimate involvement of Board Counsel (the prosecutor) in the board's Adjudicatory functions. Board Counsel, after all, had been one of the voting adjudicators of Judge White's pre-hearing suspension. Nevertheless, the Pennsylvania Supreme Court avoided dealing with these claims by describing all challenges to the proceedings conducted before the board as inconsequential:

> [t]his court is the sole arbiter of judicial discipline. The fact that Board investigates charges against a member of the judiciary and suggest a recommendation of sanctions to this Court is not the determining factor either as to whether a dereliction will be found to have occurred or the sanction to be imposed if this Court determines that the facts warrant a different result. [21a]

Still, the Court's decision was itself inescapably tainted with the procedural irregularities committed by the Board—including a pre-hearing judgment of guilt, indiscriminate *ex parte* exposure by the factfinder to prejudicial evidence, and the impermissible commingling of adjudicatory and prosecutorial functions in violation not only of the federal constitution but of the board's own rules. Because the court did not exercise the option to hear the evidence firsthand, it necessarily relied on the three member Board panel for the one fact that only the hearing panel could assess—the credibility of live witnesses, including Judge White. The credibility issues were absolutely critical in this case.

It is in this factual setting that Appellant raises his federal challenges. The challenge to the constitutionality of Rule 24 of the Rules of Procedure Governing the Judicial Inquiry and Review Board was presented below to the Pennsylvania Supreme Court in the Answer of Respondent Thomas A. White to Petition for Interim

Relief filed on or about December 29, 1986. The challenge to the lack of notice that Judge White's alleged conduct breached Canons 1, 2, and 5(c)1 was raised in Appellant's brief to the Supreme Court of Pennsylvania filed on or about October 13, 1987. In Appellant's Application for Reargument filed in March, 1988, after the Pennsylvania Supreme Court issued its Opinion, the due process challenge to those Canons and Article V, §17(c) of the Pennsylvania Constitution, as applied by the Court, was submitted for the consideration of that Court. The federal challenge to the excessiveness of the Pennsylvania Supreme Court's penalty was also presented in the Application for Reargument. Challenges to the fairness of the process afforded Appellant in all state proceedings were made in his Brief to the Supreme Court of Pennsylvania and in his Application for Reargument.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. Canons 1, 2, & 5(c)(1) of the Code of Judicial Conduct and Article V, Section 17 of the Pennsylvania Constitution are Unconstitutional as applied to Appellant.

In the words of Justice Papadakos of the Pennsylvania Supreme Court, "with one fell swoop of the pen, the court today removes from office more elected officials than have been removed from the other branches of government in the history of the Commonwealth." This Appeal is not, however, taken because of the historic dimension of the removal of eight judges and not because Judge White's well-meaning handling of a gift should be considered a perfect model. It is filed because the actions below represent a serious threat to federal due process rights. In the crisis atmosphere created by a combination of criminal misconduct by some judges and indiscriminating press publicity, the liberties guaranteed by the Constitution were sadly forgotten. Expediency in removing judges ruled the day. Although it may be tempting to overlook the breaches of due process as a tolerable exchange for the resolution of the upsetting "Roofers case," the exchange is much too costly to the principle and safety of the law. The test of adherence to law is the adherence to law in a crisis.

Canon 1 of Pennsylvania's Code of Judicial Conduct demands in the broadest terms that "integrity and independence of the judiciary. . .be preserved. . . ." Canon 2 in turn requires that a judge's conduct "promote[ ] public confidence in the integrity and impartiality of the judiciary" and avoid conveying to others "the impression that they are in a special position to influence him." Canon 5(c)(1) similarly demands that a judge not conduct himself in such a way as to "tend to reflect adversely on

his impartiality." Article V, Section 17(c) of the Pennsylvania Constitution additionally prohibits "any fee, emolument, or perquisite other than the salary and expenses provided by law"[8].

Despite this impressive assemblage of rules amassed against Judge White, the truth is that Pennsylvania has no express prohibition on the receipt of gifts by judges. This is no accident. Indeed, the ABA Model Code of Judicial Conduct, Canon 5(c)(1) was rejected by the Pennsylvania Supreme Court, as was the former Canon 32 of the Canons of Judicial Ethics, 425 Pa. XXiii,XXXV, effective February 11, 1965. Both provisions had expressly prohibited certain gifts.

The law in Pennsylvania as it appeared to all judges at the time of the conduct in question was by conscious directive lacking in any provision specifically prohibiting gifts. Likewise there was no provision guiding any judge on the method of divesting himself and his office from the nuisance of an unwanted gift. To deepen this chasm of uncertainty, the Pennsylvania Supreme Court, by its Order No. 47, separately required the reporting of all gifts having a value in excess of $200. 503 Pa. XXXiv, 472 A.2d LIV. This further strongly suggested the acceptability of a gift so long as it was reported. Of course, the gift in question in this case *was* duly reported.

In this legal context, a judge who received an unwanted gift discovered after it was placed in his chambers by someone whose whereabouts was at best uncertain cannot reasonably be charged with the fore-knowledge either that the gift was prohibited or, more importantly, that his method of rejecting the gift by distributing the money to others would subject him to removal from office. The only true guidance given to a judge in advance was to act with integrity, impartiality, and judicious demeanor. To a judge who has never even

[8] Each of these provisions appears in the Appendix.

been accused of compromising a case or personally benefitting from the gift which was dropped at his doorstep, there was no fair notice by rule or by case law that his distribution of the gift among court employees would place him in breach of any Canon.

In applying its Canons and Article V, section 17(c) of the Pennsylvania Constitution, the Pennsylvania Supreme Court has declared that receiving gifts from potential litigants is misconduct even if the gifts are reported. It has further declared that a judge's divestment of the benefits of an unwanted gift received from an individual who was believed inaccessible for a return of the gift was absolutely meaningless and should be treated for all purposes as if the gift had been embraced and used by the judge. The Court ruled that once "dominion" was accepted, all analysis ends.[9]

Although Judge White in retrospect can now clearly appreciate the importance of taking great pains to return any gift to the donor, his conduct in disavowing the unwanted gift by redirecting it to others in a way which appeared harmless to him in light of then existing rules and case law is beyond any fair punishment. Where gifts were not *per se* prohibited, where the gift to Appellant was duly reported, where Appellant did not promote any impression that he could be influenced, and where the donor's location was unknown, Appellant's good faith effort in the midst of a busy schedule to separate himself from a $300 nuisance gift was simply not a prohibited act.

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[9] The Pennsylvania Supreme Court's inflexible postulate that dominion of the gift ends all analysis would, curiously, have convicted even St. Thomas More who had once been charged with receiving a "great gilt cup" as a gift from a litigant's wife. The accused More confessed that he "refused not to receive it", thereby accepting dominion. Then, after using the gift briefly, he made it a gift to the donor's husband. W. Roper, *The Life of Sir Thomas More* at 34 (London 1902). It is respectfully submitted that this Court's absolute dominion rule would have been even harsher to Thomas More than were the tribunals of Henry VIII before whom More was vindicated for that charge.

This Honorable Court in *Calantti v. Franklin*, 439 U.S. 379 (1979), observed in the clearest possible terms:

> that, as a matter of due process, a criminal statute that "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States v. Harris*, 347 U.S. 612 (1954), or is so indefinite that it "encourages arbitrary and erratic arrests and convictions," *Papachriston v. Jacksonville*, 405 U.S. 156 (1972) is void for vagueness.

In this quasi-criminal case, the danger is extreme that the intimidating influence of adverse publicity aimed squarely at the judiciary invited the exercise of arbitrary discretion to appease press demands. In such a climate, Judge White became the victim of precisely that "standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352 (1983). It is this extreme danger of arbitrariness which, if tolerated, will forever haunt the multitude of state professional disciplinary processes which are often on the front line of press pressure and have a life and death hold on the professional status of many men and women who shape this nation's destiny. There can be no question that the principle of an independent judiciary cannot co-exist with a policy of arbitrary removals from the bench. If not corrected, the precedent set by the Pennsylvania Supreme Court will encourage charges and prosecutions to arise from nothing more definite than a prosecutorial wish.

B. Rule 24 violates the federal Constitution both on its face and as applied because it permits severe and irreparable effects upon the accused's interests without assuring any prompt hearing and disposition and because it is an *ex post facto* law and bill of attainder.

Rule 24 of the Rules of Procedure Governing the Judicial Inquiry and Review Board by its terms permits the Board to make an equitable application for a

prehearing suspension of a judge charged with conduct which causes "immediate and substantial public harm and an erosion of public confidence. . . ." Rule 24(a). The Rule envisions that after suspension the Pennsylvania Supreme Court may then grant the requested equitable relief following a review of the written petition and the written answer. Thereafter, the respondent judge must bear the burden of moving the Supreme Court to dissolve or amend any resulting interim order.

Rule 24 has been used to strip a judge of his office before a hearing and at the same time provide no true guarantee of any prompt conclusion either by the Board or by the Supreme Court. According to the rule, even an innocent judge must suffer the severe and irreparable effects of suspension based solely on paper allegations; he must then endure that condemnation indefinitely until both the Board and Supreme Court, busy with numerous pending cases, are ready and able to decide it. The due process clause of the fourteenth amendment forbids the procedure set out in Rule 24. That rule is constitutionally deficient both on its face and as applied.

In *Barry v. Barchi*, 443 U.S. 55 (1979), this Honorable Court struck down an analogous New York statute which allowed a harness racing commission to summarily suspend the trainer of a horse where post-racing urinalysis indicated that the horse had been drugged. The Court stated:

> Here, the provision for an administrative hearing, neither on its face nor as applied in this case, assured a prompt proceeding and prompt disposition of the outstanding issues between Barchi and the State . . . Once suspension has been imposed, the trainer's interest in a speedy resolution of the controversy becomes paramount, it seems to us . . .
>
> In these circumstances, it was necessary that Barchi be assured a prompt postsuspension hearing, one that would proceed and be concluded without appreciable delay. Because the statute as applied in

> this case was deficient in this respect, Barchi's suspension was constitutionally infirm under the Due Process Clause of the Fourteenth Amendment.

Id. at 66.

The principle espoused in *Barchi* is directly applicable in this case where a judge's elected status was stripped indefinitely without any assurance of a prompt disposition and with only vague suggestion that the post-termination hearing be held "without appreciable delay." The United States District Court in *Gershenfeld v. Justices of the Supreme Court of Pennsylvania*, 641 F. Supp. 1419 (E.D.Pa. 1986), recently made the applicable constitutional standards very clear to the Pennsylvania high court in striking down Rule 208(f) of the Pennsylvania Rules of Disciplinary Enforcement because they permitted summary suspension of the right to practice law without assuring a prompt disposition.

There is also no question that Rule 24 was an emergency measure passed by the Court specifically to enable the Board to seek "interim relief" against the group of judges who were the alleged recipients of money from the Roofers' Union. The procedure in Rule 24 has since been used by this Court to deprive Judge White of his title, position and livelihood, as a result of characterizations of alleged events involving the Roofers' Union occurring prior to the passage and effective date of the Rule. The use of this means to deprive the Petitioner of his recognized property interest was illegitimate as an *ex post facto* law and a bill of attainder.

In *United States v. Lovett*, 328 U.S. 303 (1946), the House Appropriations Committee had determined that certain federal agency workers had engaged in subversive activities. Congress thereupon precluded the appropriation of funds to compensate these unpopular individuals. The employees then sued for reimbursement. The Supreme Court affirmed a judgment for the employees and stated that acts which "apply either to

named individuals or to easily ascertained members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." The deprivation of job and salary was considered to constitute such punishment.

In this case, the passage of Rule 24 by the Court in its rulemaking role, and the application of that rule to Judge White and others without any hearing, was the legal equivalent of the legislative trial forbidden by Article I, Section 10 of the United States Constitution.

C. The penalty of removal of an elected Judge constitutes a violation of due process in that it is excessive and disproportionate, in breach of cruel and unusual punishment and equal protection standards.

The Eighth Amendment's limitation upon punishments, that they not be "cruel and unusual," is a standard traditionally applied to criminal cases to ensure that punishments are not physically barbarous, that they do not unnecessarily and wantonly inflict pain, *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976), and that they are not disproportionate to the severity of crimes committed. *Rhodes*, 452 U.S. at 347. The proportionality of the punishment is assessed according to objective criteria, such as "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Solem v. Helm*, 463 U.S. 277, 293 (1983). In other words, "Eighth Amendment judgments should neither be nor appear to be merely the subjective views' of judges." *Rhodes*, 452 U.S. at 347 (quoting *Rummel v. Estelle*, 445 U.S. 263, 275 (1980)).

Although the Eighth Amendment has not been applied to civil proceedings directly, the applicability of its principles through the due process and equal protection

clauses of the fourteenth amendment is both proper and necessary in a quasi-criminal proceeding, whose result is so severe that it promises to taint the tombstone of the victim. *See Gann v. Delaware State Hospital*, 543 F. Supp. 268 (D. Del. 1982); *cf. Ingraham v. Wright*, 430 U.S. 651, 669 n.37 (1977). Even Pennsylvania case law recognizes that the criminal standard for cruel and unusual punishment also applies to other proceedings. Accordingly, this principle has been considered in reference to the revocation of a driver's license, *Drogowski v. Commonwealth of Pennsylvania*, 94 Pa. Cmwlth. 205, 503 A.2d 104 (1986), *allocatur denied*, 531 A.2d 1120 (Pa. 1987), to the revocation of pharmacists' licenses, *Moeslein v. State Board of Pharmacy*, 60 Pa. Cmwlth. 574, 432 A.2d 295 (1981); *Carr v. State Board of Pharmacy*, 48 Pa. Cmwlth. 330, 409 A.2d 941 (1980), and to the revocation of a nurse's license, *Tighe v. State Board of Nurse Examiners*, 40 Pa. Cmwlth. 367, 397 A.2d 1261 (1979).[10] Federal due process requirements under the fourteenth amendment must not lose sight of the principles developed under the cruel and unusual punishment provision where the facts in a state quasi-criminal proceeding show the same deleterious influences at work. The *Solem* standard for prohibiting cruel and unusual punishment must therefore be applied to the facts in the present case.

The undue harshness of the penalty is glaringly apparent in this case. In *In Re Dandridge*, 462 Pa. 67, 337 A.2d 885 (1975), a judge accepted outright a gift of $23,500 from lawyers and potential litigants at a testimonial dinner. He even put these proceeds towards his own personal use. The Pennsylvania Supreme Court responded by admonishing

[10] In revoking the driver's license, however, the court distinguished revocation of that license from other types of licenses because such a revocation was required by statute, and not at the court's discretion. *Drogowski, supra*, at 106. Additionally, the cruel and unusual punishment prohibition is applied to civil proceedings "when the issue to be determined is whether an abuse of discretion has taken place." *Id.*

him for accepting these proceeds, and merely ordered him to return the amount of the gift to the state (*not to the original donors*). The difference in punishment between *Dandridge*, the previously controlling state opinion, and the present case is alarming.[11] In this case the Pennsylvania Supreme Court sanctioned Judge White with permanent dismissal for receipt of a monetary gift which was of a much lesser amount than that received by Dandridge, was not used by the judge personally but distributed to others as a means of rejecting the gift, was not knowingly accepted in the first place, and was duly and openly reported to the Court Administrator pursuant to formal requirement. In comparison to the wrist-slapping repayment ordered in *Dandridge*, the previously dominant and controlling authority in the area of gifts, the sanction Judge White received is manifestly excessive.

The excessiveness of Judge White's penalty of removal is even more clearly seen when compared to other cases in which removal was *not* ordered. In *In Re Greenberg*, 457 Pa. 33, 318 A.2d 740 (1974), a judge's suspension was later reversed by the Pennsylvania Supreme Court despite his felony conviction in federal court of criminal conspiracy. Judge White's punishment is excessive as compared not only to punishment for the offense he committed, but also to the penalty faced by others for more serious offenses.

It must also be considered that the public gave its own judgment by voting to retain Judge White in a municipal public election. No proper interest is served in imposing the most severe penalty for conduct which, however errant it may seem in the retrospective glare of constant publicity, is ultimately deemed innocent by the public.

[11] The cases are scarce, but they reveal that in another jurisdiction, a judge solicited a $1000 loan from each of two attorneys practicing before him. This judge was reprimanded with only a three-month suspension without pay. *In Re Anderson*, 312 Minn. 442, 252 N.W.2d 592, 595 (1977). There is no known precedent ordering removal on facts similar to those in the present case.

The voting public's response to the facts of this case is to reembrace Judge White as an elected official. Knowing this, the Pennsylvania Supreme Court still administered the severest sanction of removal in open defiance of its past custom and the principles announced by the Chief Justice of the Pennsylvania Supreme Court in exonerating another judge:

> Petitioner, having been elected by the people of the City of Philadelphia in the municipal election of 1965 to commence a ten-year term of office beginning January, 1966, must if he wishes to continue to serve in that capacity for *retention elections* in the municipal elections of 1975. If as contended by the dissent petitioner's actions have occasioned a loss of confidence in his ability to discharge his judicial duties it will best be demonstrated at that time. [318 A.2d at 747 (concurring opinion) (emphasis added)].

The abandonment of this principle in Judge White's case is further clear proof of the excessiveness of the penalty of removal and the Pennsylvania Supreme Court's overraction to massive press pressure.

D. The Pennsylvania Supreme Court deprived appellant of his due process right by relying upon credibility findings of a legally biased tribunal.

The Pennsylvania Supreme Court expressed in its Opinion the view that procedural irregularities before the Judicial Inquiry and Review Board were essentially inconsequential. The Pennsylvania Supreme Court reached that conclusion because it considered itself

> the sole arbiter of judicial discipline. The fact that the Board investigates charges against a member of the judiciary and suggests a recommendation to this Court is not the determining factor either as to whether a dereliction will be found to have occurred or the sanction to be imposed if this Court determines that the facts warrant a different result. [21a]

In reaching this decision, however, the Pennsylvania high court cannot escape the process which produced the record on which it relied.

Because the only body to hear evidence and fairly judge credibility was a three-member Board panel, the Pennsylvania Supreme Court's judgment to remove Appellant was necessarily infected with all the procedural irregularities implied by its disownment of the Board's process. Key among these irregularities are the alarming pre-hearing Board declaration that a violation of the Code of Judicial Conduct actually took place; the public suspension of Appellant based on that finding; the reliance *ex parte* on collective evidence consisting of tapes of other judges being implicated and of tapes referring to Judge White in Judge White's absence; and the intermingling of prosecutorial and adjudicatory functions evidenced not only by Board Counsel's declared participation in the pre-hearing decision to suspend but also by his obvious involvement in the *ex parte* presentation of prejudicial evidence.

It cannot be overlooked that following the hurried passage of Rule 24 of the Rules of Procedure Governing the Judicial Inquiry and Review Board and in part in response to press editorials, the Board, before any hearing on the matter, had already declared to the Supreme Court of Pennsylvania that Judge White has engaged in "conduct which, *in the judgment of the Board and the General counsel, violate the Code of Judicial Conduct.*" Petition for Interim Relief (emphasis added). The Board reiterated its conclusion of Judge White's clear guilt in its Memorandum of Support to the Petition for Interim Relief. Based on a review of all the evidence, the Board saw only guilt.

The Board's insurmountable pre-hearing condemnation made the Board not only the proverbial judge and jury but also an advocate for the prosecution. Due process cannot be satisifed where a Board has gathered evidence (however prejudicial, inadmissible, and irrelevant),

reviewed all evidence with its Counsel in secret proceedings, unanimously prejudged the accused guilty before a hearing, and called for his removal based upon a totally *ex parte* consideration. When that same Board proceeds to conduct a hearing and make credibility and other findings the process afforded to the accused cannot be fair.

According to state law, Board Counsel in this case was supposed to bear the heavy burden to prove specific charges by clear and convincing evidence. *See Matter of Johnson*, 483 Pa. 227, 395 A.2d 1319 (1978). *See also Addington v. Texas*, 441 U.S. 418, 424 (1979). The fact that charges are made against a jurist must not change the legal process which is due to him or the pristine objectivity of those who must make findings after hearing all the evidence firsthand. Each element of each charge was required to be supported by specific evidence which clearly and convincingly proved the charge. The proceedings should not have been infected at any stage with suspicion, innuendo, insinuation, or prejudgment due to the alleged conduct of other judges or any factor outside the purview of proper and admissible evidence.

In this case, however, the only factfinders who could judge whether the case against Judge White was clear and convincing and pass upon the credibility of witnesses were the Panel members, all of whom had already declared Judge White's guilt *before* the hearing. That is how the findings and conclusions were shaped. Judge White was, at the absolute least, denied any fair assessment of credibility at any stage.

The bias which pervaded the proceedings before the Board renders any order of discipline a nullity. The Fifth Circuit Court of Appeals aptly stated that once bias appears in an adjudicator,

> its effect remains throughout the whole proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints

> and vitiates all of the proceedings, and no judgment based upon them may stand.

National Labor Relations Board v. Phelps, 136 F.2d 562, 564 (5th Cir. 1943).

The Pennsylvania Supreme Court's decision to remove Appellant from the bench stands on the wobbly legs of Board proceedings laden with denials of fundamental fairness not only in the pre-hearing declaration of guilt and the *ex parte* review of prejudicial material, but also in the commingling of prosecutorial and adjudicatory functions.

After the Board and its Counsel participated in a pre-hearing investigation which assembled a wide range of inadmissible evidence, the Board purported to sit as an impartial adjudicator in order to determine the very facts it investigated. During this time, its own advisor, Board Counsel, acted as prosecutor against Judge White and as an adjudicator joining in the vote to urge Judge White's pre-hearing suspension.

In *Gibson v. Berryhill*, 411 U.S. 564, 579 n.17 (1973), this Honorable Court for the first time expressed suspicion about the simple "intermixing" of the investigatory and adjudicatory functions of licensing boards. The Court stated that

> [t]he extent to which an administrative agency may investigate and act upon the material facts of a case and then, consistent with due process, sit as an adjudicative body to determine those facts finally has occasioned some divergence of views among federal courts. Compare Amos Treat & Co. v. SEC, 113 U.S. App. D.C. 100, 306 F. 2d 260 (1962), and Trans World Airlines v. CAB, 102 U.S. App. D.C. 391, 254 F.2d 90 (1958), with Pangburn v. CAB, 311 F.2d 349 (CA 1 1962). See also Mack v. Florida State Board of Dentistry, 296 F.Supp. 1259 (SD Fla. 1969). We have no occasion to pass upon this issue here. . . .

This introductory observation merely alerted the Bar and all lower Courts that a due process issue is close by whenever a state board sits as both investigator and adjudicator. Now is the time to address the direct assault on that due process concern.

WHEREFORE, for the above reasons, this Honorable Court should note probable jurisdiction of this appeal.

Respectfully submitted,

James E. Beasley

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Order of the Supreme Court of Pennsylvania

IN THE SUPREME COURT
OF PENNSYLVANIA

In the Matter of
THE HONORABLE THOMAS A. WHITE,
Judge of the Court of Common
Pleas of Philadelphia County

Judicial Inquiry and Review
Board Docket No. 117

ORDER

Per Curiam:

AND NOW, this 29th day of March, 1988, the Application for Reargument is denied.

Mr. Justice Larsen did not participate in the consideration or decision of this matter.

TRUE COPY FROM RECORD
Attest: 3/29/88

PATRICK TASSOS
Deputy Prothonatary
Supreme Court of Pennsylvania,
Eastern District

Opinion of the Supreme Court of Pennsylvania

[J-211-218-1987]

IN THE SUPREME COURT OF PENNSYLVANIA

IN THE MATTER OF:	
THE HONORABLE MARY ROSE FANTE CUNNINGHAM COURT OF COMMON PLEAS PHILADELPHIA COUNTY	Board Hearing Docket No. 127 J.I.R.B. Docket No. 127
IN THE MATTER OF:	
THE HONORABLE THOMAS E. DEMPSEY MUNICIPAL COURT PHILADELPHIA COUNTY	Board Hearing Docket No. 123 J.I.R.B. Docket No. 124
IN THE MATTER OF:	
THE HONORABLE KENNETH E. HARRIS COURT OF COMMON PLEAS PHILADELPHIA COUNTY	Board Hearing Docket No. 115 J.I.R.B. Docket No. 120
IN THE MATTER OF:	
THE HONORABLE JULIAN F. KING COURT OF COMMON PLEAS PHILADELPHIA COUNTY	Board Hearing Docket No. 116 J.I.R.B. Docket No. 115
IN THE MATTER OF:	
THE HONORABLE MITCHELL S. LIPSCHUTZ COURT OF COMMON PLEAS PHILADELPHIA COUNTY	Board Hearing Docket No. 117 J.I.R.B. Docket No. 122
IN THE MATTER OF:	
THE HONORABLE WILLIAM J. PORTER COURT OF COMMON PLEAS PHILADELPHIA COUNTY	Board Hearing Docket No. 120 J.I.R.B. Docket No. 114
IN THE MATTER OF:	
THE HONORABLE MICHAEL E. WALLACE COURT OF COMMON PLEAS PHILADELPHIA COUNTY	Board Hearing Docket No. 122 J.I.R.B. Docket No. 119
IN THE MATTER OF:	
THE HONORABLE THOMAS A. WHITE COURT OF COMMON PLEAS PHILADELPHIA COUNTY	Board Hearing Docket No. 119 J.I.R.B. Docket No. 117 ARGUED: November 11, 1987

OPINION

NIX, *C. J.* FILED: February 25, 1988

The Judicial Inquiry and Review Board ("Board") instituted formal proceedings against eight sitting Philadelphia County judges, the respondents herein. One of these judges is a member of the Municipal Court, with the remaining judges serving on the Court of Common Pleas. The Board initiated an inquiry following public disclosures involving a labor racketeering investigation being conducted by the Federal Bureau of Investigation. On October 23, 1986, a federal grand jury sitting in Philadelphia returned a multi-count indictment charging nineteen individuals associated with Roofers Union Local 30-30B ("Roofers Union" or "Union") with racketeering acts. Among other things, the grand jury charged that Stephen Traitz, Jr., the business manager for the Union, and other Union representatives used money obtained through kickbacks to make cash payments to public officials, including members of the Philadelphia judiciary.

The Board requested and obtained information developed in connection with the federal investigation. Shortly thereafter, letters of inquiry pursuant to J.I.R.B. Rule 1(b) were issued to each of the respondents, stating that the Board had reason to believe that each of the respondents had received cash from the Union in 1985. Formal charges were issued on January 15, 1987, and on January 30. 1987, respondents were suspended with pay by this Court pending ultimate resolution of these proceedings.[1]

[1] We rejected the Board's recommendation that respondents be suspended without pay during this interim period. *See* Judicial Administration Docket Nos. 66, 69, 70, 72, 74, 76, 77, 80, dated January 30, 1987.

Article V, section 18 of the Pennsylvania Constitution grants the authority for the suspension or removal for misconduct in subsection (d). Art. V, §18(d). Subsection (h) of that section further provides that

(Footnote continued on following page.)

The Board conducted hearings on these matters in March and April 1987 at which time respondents appeared with counsel. Each of the hearing panels issued a report which was followed by issuance of a preliminary report on behalf of the entire Board. A copy of this report was served upon the respondents, each of whom was afforded an opportunity, pursuant to J.I.R.B. Rule 11, to present written objections thereto and to appear again before the Board.

On August 5, 1987, the Final Report and Recommendation of the Board was filed with this Court pursuant to J.I.R.B. Rule 16. The Board found, *inter alia*, that in December of 1985 each of the respondents had received cash in the sum of $200, $300 or $500 from the Roofers Union via Traitz or another Union

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(Footnote continued from preceding page.)

upon a final order of suspension or removal "his salary shall cease from the date of such order." Art. V, §18(h). There is no such authorization for the stopping of the salary of a jurist in the case of an interim suspension where the matter has yet to be finally adjudicated. Moreover, an interim suspension is not expressly provided for in article V, section 18 as a type of discipline to be imposed as a sanction for misconduct or misbehavior in office. The creation of this remedy under J.I.R.B. Rule 24 was not intended to create a new sanction.

As the language of Rule 24 expressly states, the interim suspension was not intended to serve as a sanction for the alleged misconduct but rather it was designed to serve as a means to avoid harm to the public and/or to prevent the erosion of public confidence by actions of the charged jurist until there can be a final determination as to the validity of the charges and the imposition of the appropriate punishment. Indeed a contrary view would create serious due process questions since the validity of the accusations have yet to be finally determined. It is for this reason that this Court did not accept the Board's recommendation as to the stopping of the pay of these judges during the interim suspension. Even if the interim suspension was viewed as a type of "otherwise disciplined" as provided for under Article 5, section 18(d), there would be no authority to cause the salary of the jurist to be stopped.

representative. The Board also concluded that the Roofers Union is a potential litigant before the Philadelphia courts of which respondents are members. The Board determined that receipt of the cash gift by the respondents constituted a violation of Canons 1, 2 and 5C(1) of the Code of Judicial Conduct. Finally, the Board recommended that each of the respondents be removed from judicial office, a disciplinary sanction authorized by Article V, Section 18(d) of the Pennsylvania Constitution.[2]

Under Article V, section 17 of the state constitution it is mandated that "Justices and judges shall devote full time to their judicial duties," Art. V, §17(a), and that they "shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the Supreme Court." Art. V, §17(b). Most pertinent to our instant inquiry, subsection (c) of section 17 provides that "[n]o Justice, judge or justice of the peace shall be paid or accept for the performance of any judicial duty or for any service connected with his office, any fee, emolument or perquisite other than the salary and expenses provided by law." Art. V, §17(c).

To implement the enforcement of section 17, section 18 of the same article creates a Judicial Inquiry and Review Board and vests in that body the responsibility to "keep informed as to matters relating to grounds for suspension, removal, discipline, or compulsory retirement of" judicial officers. Art. V, §18(e). After providing for a procedure to investigate such "complaints or reports"

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[2] Six members of the Board recommended removal of all respondents from the Bench. Three members recommended public censure and suspension without pay for a period not to exceed one year as the appropriate sanction for all respondents except Judge Harris, in whose case the vote for removal was unanimous.

received "from any source pertaining to such matters", Art. V, §18(e), that Board upon a finding of "good cause therefor" of the charges "shall recommend to the Supreme Court" the appropriate sanction, in its judgment, for the dereliction it has found to have occurred. Art. V, §18(g).

The Supreme Court must "review the record of the Board's proceedings on the law and facts and may permit the introduction of additional evidence." Art. V, §18(h). The Court has the option of making its independent judgment and may "wholly reject the recommendation, as it finds just and proper." Art. V, §18(h). The language of the Article clearly does not condition the scope of our discretion upon this Court's decision to receive additional evidence. This Court is vested with the responsibility of making its independent determination as to the inferences to be drawn from the testimony presented, without regard to whether the Court deems it necessary to require additional testimony to be taken, and this Court has the final responsibility of determining the appropriate sanction that should be imposed. Art. V, §18(h). *See also In Matter of Glancey* _____ Pa. _____, 527 A.2d 997, 1005 (1987); *Judicial Inquiry & Review Bd. v. Snyder,* 514 Pa. 142, 523 A.2d 294 (1987).

The sanctions that may be considered are suspension, removal, discipline or compulsory retirement. Art. V, §18(h). Upon the entry of an order of suspension or removal, the salary of the jurist "shall cease from the date of such order." Art. V, §18(h). Upon the entry of an order requiring compulsory retirement, the jurist "shall be retired with the same rights and privileges were he retired under section sixteen of this article." Art. V, §18(h). Section 16(b) of Article V makes it clear that the

compensation and retirement provisions of that section are not to be applicable to a judicial officer who has been suspended or removed from office. Art. V, §16(b). It is equally significant that this bar is not made applicable to one subject to discipline or compulsory retirement. *See* n. (1).

It is important to underscore the distinction between the suspension or disbarment of a lawyer, *see Office of Disciplinary Counsel v. Keller*, 509 Pa. 573, 506 A.2d 872 (1986), and the suspension or removal of a judge. The practice of law is a private pursuit, even though it has a significant impact upon a public function. Where a lawyer is found to have been derelict in his or her responsibilities, it primarily affects those who elect to repose their trust in that individual. In such cases, disciplinary action is necessary to prevent a continuation of the objectionable behavior and to repair where possible the damage to the integrity of the process that resulted from that errant conduct.[3] By suspension or disbarment the miscreant is prevented from causing further harm and his or her responsibilities can be assumed by others who will faithfully discharge them. Thus a period of suspension impacts only upon the offending lawyer. Where a judicial officer breaches the trust vested in one holding that office, the injury is further compounded because a public trust has been betrayed. *See, e.g., Gardner v. Broderick*, 392 U.S. 273 (1968). Moreover, the responsibilities of that office may only be discharged by one who has been chosen by the people to perform those duties. At this time when court case loads have reached unprecedented levels, the need for all of our authorized judges to be functioning

[3] This Court established a Client Security Fund to protect the interest of those who have been damaged by defalcating attorneys. Pa. R.D.E. 502 *et seq.*

efficiently has never been greater. Thus to employ a punishment that would render the office inoperative would compound the injury caused to the system by the misconduct of the offending judge.[4] Such a result was never intended under our constitution.

Under Article 5, section 18(d), a judge who experiences a disability which seriously interferes with the performance of the duties may be retired and the office filled by one able to perform the tasks required by the office. In such instance the inability to perform does not arise from fault on the part of the jurist but rather from illness or other disability for which the jurist cannot be held accountable.[5] Even in instances such as these there is a clear expression under the scheme set up in our constitution that recognizes the need to fill the office with one capable and competent to carry out the responsibilities demanded by the position. The sanction of removal, which carries with it an automatic bar from ever holding judicial office in this Commonwealth in the future, expressly mandates forfeiture of the office. Art. V, §18(l). *Judicial Inquiry & Review Bd. v. Snyder, supra.* Thus a vacancy is created and the errant jurist can be replaced. Equally apparent is that the sanction of "discipline", which does not provide for the termination of the jurist's salary, was not intended to include a cessation of his or her performance of the duties of the office of judge. *See In the Matter of Arthur S. Kafrissen,* No. 93 Judicial Inquiry and Review Board Docket (1986). Thus the concern presently being considered is not a factor in the imposition of that type of sanction.

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[4] Unlike the situation of the interim suspension, here the judge has been found to have committed the offenses charged. *See* n. 1.

[5] Under an order of compulsory retirement the affected jurist is "retired with the same rights and privileges were he retired under section sixteen of the article." Art. V, §18(h).

The language of the constitutional provisions are not as explicit as to whether the sanction of suspension permits the seat to be filled by a newly elected or appointed jurist. While suspension, like removal, requires that the salary cease from the date of the entry of such an order, Art. V, §18(h),[6] it does not carry with it the automatic forfeiture of office that is mandated for the sanction of removal under subsection (l).[7] Art. V, §18(l). It would be an overly broad interpretation of subsection (l) to read it as prohibiting this Court, in the discretion vested under the article, from imposing a forfeiture of office, where appropriate, in view of the gravity of an offense that would require the imposition of a suspension. To conclude otherwise would render suspension a useless sanction. Obviously, the latter position was not the intent of the People in adopting Article V.

A sanction is designed not only to punish the offender and deter others who may be tempted by similar inducements, but where possible it should assist in ameliorating the injury caused by the dereliction. Under no circumstances should the sanction compound the injury. Any interpretation of the constitutional sanction of suspension which would preclude the replacement of the offending jurist would serve the interest of the

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[6] Art. V, §18(h) provides in pertinent part:

> . . . Upon an order for suspension or removal, the justice or judge shall be suspended or removed from office, and his salary shall cease from the date of such order. . . .

[7] Art. V, §18(l) provides:

> A justice, judge or justice of the peace convicted of misbehavior in office by a court, disbarred as a member of the bar of the Supreme Court or removed under this section eighteen shall forfeit automatically his judicial office and thereafter be ineligible for judicial office.

offender and ignore the needs of the offended. Obviously such interpretation must be rejected. We therefore conclude that although the sanction of suspension does not require an automatic forfeiture of the office, we in our discretion can require a forfeiture with the sanction of suspension where it is appropriate.[8] Such a reading still maintains a distinction between the two sanctions. Removal provides for a perpetual bar against ever holding judicial office. Suspension, while permitting the office to be declared vacant, does not impose that perpetual impediment upon a former jurist.

We approach these cases mindful of our duty to uphold the integrity of our system and thereby maintain the public confidence. Of equal concern is our sworn obligation to pass judgment fairly upon any party who comes before the bar of this Court. To this end, we have scrupulously reviewed the records in each of the eight cases presently before us, and while the matters are being resolved in one opinion, it should be emphasized at the outset that this format was selected because all of the cases arise from the same factual genesis and raise a number of identical legal and factual challenges. The individual merit of each matter has in no way been obscured or compromised by the disposition of these cases in this joint opinion. Our review will commence by addressing those common legal issues followed by a discussion of the facts and legal questions unique to the individual respondents.

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[8] The failure of the Board to recognize this possibility is probably the reason for the inability to arrive at a unanimous recommendation in more than one case. A suspension for a period of up to one year coupled with the loss of productivity of these jurists during the interim suspension results in an intolerable burden placed upon the people of this judicial district and would further strain the resources of the entire system.

I.

A.

Question has been raised as to whether, under our Code of Judicial Conduct adopted by this Court on November 21, 1973, effective January 1, 1974, 455 Pa. xxix, 310 A.2d xxxix (1973), the acceptance of a gift by a judicial officer is prohibited conduct *per se*. Before reaching that question, it must be noted that Article V, section 17(c) as previously stated, specifically prohibits a jurist from receiving, in connection with the duties of the office, "any fee, emolument or perquisite other than the salary and expenses provided by law."[9] The record before us is clear that the Union intended that the giving of these "gifts" was to secure favorable treatment for the Union or its members who may have occasion to appear before any of those judges who were the recipients of the "gifts." Thus, if the jurist knew or should have known that the "gift" was being offered to curry favor with him or her in the performance of their judicial responsibilities, the acceptance of such "gifts" would constitute a prohibited activity under section 17(c), without regard to the provisions of the Code.[10] The people of this Commonwealth expressed through section 17(c) their intent to expressly proscribe a course of conduct that would undermine the integrity of a system by destroying impartiality that is the hallmark of a just

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[9] Art. V, §17(c) provides:

> No justice, judge or justice of the peace shall be paid or accept for the performance of any judicial duty or for any service connected with his office, any fee, emolument or perquisite other than the salary and expenses provided by law.

[10] Art. 5, §17 proscribes conduct which must be considered prohibited for any judicial officer without regard to any canon of judicial ethics this Court may determine appropriate.

and fair system. Thus the gravity of a breach of section 17(c) is self-evident and would justify the imposition of the most extreme sanction provided for under section 18.

It would not be appropriate to attempt to limit section 17(c) to the proof of a specific expressed clandestine agreement to render a decision in a specific matter. It is clear by the language employed that the intent was to prohibit a jurist from permitting any person or entity from establishing a relationship, through the transmittal of anything of value, to place that person or entity in a favored position. It is also appropriate to read the Code promulgated by this Court as prohibiting that conduct expressly condemned under section 17(c). Section 17(b) vested in this Court the responsibility to prescribe canons of legal and judicial ethics. Clearly that direction intended that we prohibit behavior that the constitution expressly forbids. Thus the Code must be interpreted as prohibiting conduct that the constitution deems unacceptable.

Moreover, the jurist's responsibility under section 17(c) should be evident to any person qualified to hold judicial office. The fact that the Board was concerned primarily with 17(b) and the provisions of the Code promulgated thereunder does not preclude this Court from making a finding of a violation under 17(c), if the record warrants such a finding. No rights of the respondents are offended by this Court assessing the conduct presented in this record in light of the prohibition set forth in 17(c), while reviewing the specific charges found to have been sustained by the Board. We are also satisfied that fair warning has been given by section 17(c) as to the type of conduct it was designed to prohibit and that a judicial officer offending that provision cannot be heard to raise

a claim of inadequate notice. We are of the view that a violation of 17(c) would warrant a sanction of removal without the necessity of establishing any specific violations under the Code.

In this context, it should be noted that the fact that the value of the "fee, emolument or perquisite" may appear de minimis is of no significance if it was given and received to influence the judicial officer in the performance of his or her judicial responsibilities. The clear purpose of this provision is to assure the objectivity of the jurist. Whatever the value of the token, if it is given and received to secure a favored position for the donor with the jurist in the performance of his or her official responsibilities, the impartiality of the judgment has been eroded and the integrity of the process destroyed thereby. The question is not the intrinsic value of the thing offered but rather its impact upon the actions of the jurist.

B.

The next question to be considered is the propriety of the acceptance of these cash "gifts", in amounts ranging from two hundred to five hundred dollars, from a potentially litigious organization. As has been stated, the intent of the donor was to curry favor with the jurist in an expectation of favored treatment in the event any of the members of the organization appear before that jurist. This fact is clearly established on the record and is not seriously challenged.[11] Moreover, each jurist has the responsibility of not only avoiding an impropriety, but also of avoiding the appearance of an impropriety. Commentary, Canon 2 of the Code of Judicial Conduct.

[11] In the Matter of *Lipschutz* it is contended that a special relationship existed between Mr. Traitz and the judge which explained the reason for the gift. That contention will be discussed *infra*.

Thus when a jurist is offered a gift by a litigant he or she must be aware of the possible appearance of an impropriety. Such gifts should not be accepted unless a relationship exists, and the circumstances are such that a conclusion of wrongdoing cannot reasonably be drawn.[12] The jurist must be held accountable, even though he or she may not harbor an intent to show favor to the donor, in those circumstances which would legitimately give rise to a contrary conclusion. *See In the Matter of Dandridge,* 462 Pa. 67, 337 A.2d 885 (1975). In accepting gifts in questionable situations the judge exposes himself to such a charge. Such a demanding standard is justified in view of the importance of the interest to be protected.

C.

We are satisfied that Canons 1, 2 and 5C(1) were all designed to support the standard of impartiality mandated under Article V, section 17(c) of the Pennsylvania Constitution.[13] The "high standard of

[12] We reject the implication in the Matter of Dalessandro, 483 Pa. 431, 397 A.2d 743 (1979), that matters in one's personal life which legitimately reflect upon the jurists' professional integrity are immune from censure. The opinion in that appeal was joined by only two members of the Court and therefore does not represent a binding precedent. However, the test of the appearance of impropriety is not to be given an overly scrupulous gloss. The overly suspicious mind often assigns guilt where none exists.

[13] The applicable canons read as follows:

CANON 1
A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

(Footnote continued on following page.)

conduct so that the integrity and independence of the judiciary may be preserved", required in Canon 1, obviously embraces the impartiality of judicial decisions. The direction of Canon 2(a) that the judge "should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary", is also designed to protect the same interest. The prohibition against improper influence in the decisional process in Canon 2(b) is likewise directed at preserving the objectivity of court judgments. Canon 2(b) in addition expressly condemns any attempt on the

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(Footnote continued from preceding page.)

CANON 2
A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or knowingly permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

CANON 5
A JUDGE SHOULD REGULATE HIS EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH HIS JUDICIAL DUTIES

* * *

C. Financial Activities

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

part of the judge to "convey or knowingly permit others to convey the impression that they are in a special position to influence him." Canon 5C(1) clearly directs the jurist in his or her extra judicial activities not to engage in ventures that would "tend to reflect adversely on his impartiality." Again the need for the impartiality of the judgment to be unquestioned is evident. The canons in question were intended to support the mandate of impartiality set forth in Article V, section 17(c) and were properly considered by the Board in view of the charges leveled against these respondents.

What first becomes apparent upon reading each of these canons, either separately or together, is that nowhere are gifts to judicial officials expressly prohibited. As several of the respondents have correctly indicated, a *per se* prohibition, once the rule in this Commonwealth,[14] has been superseded by the Code of Judicial Conduct which does not contain a provision similar to former Canon 32. *See In the Matter of Dandridge, supra.* In addition, Canon 5C(4) of the ABA Model Code of Judicial Conduct, prescribing those circumstances under which acceptance of a gift would be permissible, was rejected by this Court.[15] We cannot agree, however, that the Code as adopted does not

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[14] Canon 32 of the Canons of Judicial Ethics formerly provided:

> A judge should not accept any presents or favors from litigants, or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment.

425 Pa. XXiii, XXXV, effective February 11, 1965.

[15] Canon 5C(4) of the ABA Model Code allowed a judge to accept "a gift incident to a public testimonial to him, books supplied without cost to him for official use, and an invitation to him and his spouse to attend without cost a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice."

prohibit receipt of monetary gifts under circumstances which would tend to reflect adversely upon the integrity of the judiciary.

This Court's rejection of a *per se* prohibition against a jurist receiving a gift reflected our recognition that there would be occasions where such acceptance would be proper. The interest to be protected is the impartiality of the judicial process; the impropriety of accepting a gift arises only when that interest is compromised. Thus a *per se* prohibition is not only unnecessary, it would constitute an unnecessary restriction upon the conscientious jurist.[16] However, this Court cautioned early that the decision not to reinstate a counterpart of old Canon 32 did not legitimize the acceptance of an improper gift. In *Dandridge* we stated that "[a]lthough the language of Canon 32 does not survive in the new Code, the earlier prohibition against accepting improper gifts is encompassed in the language of new Canon 5, subd. C(1)." *Id.* at 73, 337 A.2d at 888.

II.

Having established the canons in question would prohibit a gift, where the acceptance would compromise the objectivity of the jurist, we now turn to specific objections raised by respondents as to the applicability of these canons to the instant cases. It has been urged that these provisions are hortatory in character and thus have no independent effect. Notwithstanding the

[16] Pursuant to this Court's Order No. 47 of April 13, 1984, every jurist in this Commonwealth is required to file, on an annual basis, a "Statement of Financial Interest." 503 Pa. xxxiv, 472 A.2d LIV. On that Statement a jurist is required to disclose all gifts with a value of $200 or more. *Id.* at xxxvii, 472 A.2d at LVIII. Failure to make the disclosure subjects the jurist to sanctions. *Id.* at xxxv, 472 A.2d at LV.

aspirational quality of the canons, it should be clear that they describe the type of conduct to which a judicial officer will be required to conform and that a departure will occasion a censure. Nor should one who asserts his or her competency to hold judicial office have difficulty in understanding concepts such as "integrity", "independence" and "impartiality." An argument relying upon vagueness will not prevail. The specificity which is being urged is not only unnecessary, it is- also inappropriate for a code of this nature.

It should not be necessary for those aspiring to hold the esteemed office of judge to be given specific examples where one's impartiality may be reasonably questioned.[17] The judgment of a judicial officer should be sensitive to such situations. If not, there could be serious question as to the competency of that individual to hold judicial office. This Court has consistently held judicial officers to the standards set forth in the Code since its adoption. These belated complaints as to its clarity and binding effect ring hollow in this setting.[18]

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[17] One respondent argues that the Board's distinction between a $300 gift from the Roofers and in-kind gifts of approximate value from other organizations cannot be gleaned from a fair reading of the Canons. This analysis begs the question. In *Office of Disciplinary Counsel v. Campbell*, 463 Pa. 472, 345 A.2d 616 (1975), *cert. denied*, 424 U.S. 926 (1976), we stated that "[w]here one is on fair notice that his own conduct is within that prohibited by regulation, he cannot attack the regulation simply because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit." *Id.* at 482, 345 A.2d at 621, *quoting Parker v. Levy*, 417 U.S. 733 (1974). There is no question that a gift from a potential litigant where there is no other reason for the gift other than an effort to curry favor from the jurist is clearly proscribed by these canons.

[18] The Code of Judicial Conduct was adopted November 21, 1973 and became effective January 1, 1974. 455 Pa. xxxix. Section 3302 of the Judicial Code, 42 Pa. C.S. §3302, provides in part as follows: "Judges . . . shall not violate any canon of ethics prescribed by general rule."

Respondents have also challenged the applicability of Canon 5C(1) arguing that it was intended to refer only to "financial and business dealings." They therefore argue that a gift cannot be considered to fall within "financial and business dealings." While this argument may on its face appear valid, this Court has expressly stated that Canon 5C(1) encompassed the earlier prohibition against accepting improper gifts. *In the Matter of Dandridge, supra* at 73, 377 A.2d at 888. Thus since our decision in *Dandridge* there could be no question as to the applicability of Canon 5C(1) to the acceptance of an improper gift by a jurist.

Alternatively it is argued that even if Canon 5C(1) does encompass some gifts, it should not prohibit the acceptance by a judicial officer of "token or memorial gifts." Even if we accept respondents characterization of cash payments in the amounts of $200, $300 and $500 as being token gifts, the argument must still be rejected. As stated earlier, the issue is not the value of the gift accepted, but rather whether it was improper to accept it. Where the acceptance of the gift can legitimately call into question the impartiality of the judge in matters before the Court relating to the donor, the jurist is precluded from accepting the proffered gift under Canon 5C(1). It has long been a recognized business practice to offer gratuities on occasions such as Christmas to secure or maintain a preferred position in a business relationship. Although such conduct may be appropriate for a tradesman who is offering his wares for sale, justice may never be permitted to be for sale.

Several respondents additionally challenge the application of Canon 5C(1) because, they contend, that provision was intended to apply only to ongoing dealings. Although this contention was not raised before

the Board, it has been presented to us and we conclude that it is also without merit. A single incident that undermines the integrity of judicial rulings causes irreparable harm. We therefore reject the proposed distinction that this argument would require.

Respondents argue that the procedures employed by the Board and Robert Keuch, its General Counsel-Executive Director, constitute impermissible commingling of investigative, adjudicatory and prosecutorial functions, in violation of the due process clauses of the United States and Pennsylvania Constitutions. Specifically, it is alleged that the Board filed charges against respondents after having reviewed the evidence *ex parte* with the prosecutor. In addition, it has been asserted that Keuch has acted in these matters as both legal advisor and prosecutor, resulting in an impermissible commingling of responsibilities. Respondents charge that Keuch actively participated in *ex parte* communications with the Board subsequent to the filing of charges in matters pertaining to the appropriate charges and sanctions, the nature and weight of the evidence against each respondent and the conclusion that respondents have violated the Code of Judicial Conduct. These discussions allegedly occurred while Keuch was acting as prosecutor in investigating and presenting the cases before the Board.

The issue of commingling of Board functions was recently decided by this Court in *Matter of Glancey, supra*, at _____, 527 A.2d 997 (1987). We dismissed this challenge as follows:

> We find no merit whatsoever to the Respondents' due process argument predicated on the alleged commingling of functions by the Board. We can ascertain no such improper admixture of functions.

> Moreover, the Board's recommendation has no binding effect on this Court; it is merely advisory at best, and comes here with no special presumption in its favor. Article 5, section 18(h) of the state constitution expressly provides that we may totally reject the recommendation, if in our view it is "just and proper" to do so. In sum, it is the obligation of this Court to determine if a judicial officer has in fact breached the trust reposed in him and the appropriate sanction for such a violation.
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> *Matter of Glancey*, _____ Pa. at _____, 527 A.2d at 1005.

It is this Court's judgment as to whether the respondents' conduct is deserving of censure, and the sanction to be imposed, which ultimately governs. This Court is the sole arbiter of judicial discipline. The fact that the Board investigates charges against a member of the judiciary and suggests a recommendation of sanction to this Court is not the determining factor either as to whether a dereliction will be found to have occurred or the sanction to be imposed if this Court determines that the facts warrant a different result.[19]

An objection has been raised as to the use of electronic surveillance in their proceedings. Respondents present two issues: (1) whether the federal court erred in

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[19] It is also charged that the Board violated J.I.R.B. Rules 1(c) and 24(a). The alleged violation of rule 1(c) is that the entire Board, rather than a two-member committee of the Board, initially investigated the charges against these judges. The claimed violations or rule 24(a) are (1) that the entire Board determined that this Court should be requested to enter an order of interim suspension, and (2) that the request was prematurely made. These objections must also be rejected for the reason assigned above. The ultimate judgment as to the finding of a violation as well as the decision to enter an interim suspension order were the independent judgments of this Court. Any procedural irregularity by the Board, if in fact such occurred, in no way tainted the actions taken by this Court.

providing the Board with a transcript of the electronic surveillance of the Roofers Union headquarters, and (2) whether the evidence was inadmissible hearsay.

The thrust of the first argument is in the nature of a request for suppression based upon a possibility that the surveillance evidence was illegally obtained. The first faulty premise upon which this argument is grounded is that a doctrine of exclusion is properly applicable in this setting. That doctrine has evolved in the criminal law because of the strong policy against improper police conduct. Even this concept in the criminal law was not embraced until it was determined that these improper practices were widespread. *Mapp v. Ohio,* 367 U.S. 643 (1961). No such demonstration has been made in this instance. Moreover, the propriety of excluding evidence, where the validity of the information obtained is accurate, is questionable in an area where the objective is to protect the public from corrupt judges.

However, we need not make that judgment here, since it is clear in this instance that the challenged evidence was not illegally secured. These materials were turned over to the Board by order of the District Court for the Eastern District of Pennsylvania. The fact that the order is on appeal is of no moment to the instant issue. Even if there is a reversal of that judgment at some later date, such a finding would not indicate an illegality on the part of the Board that would justify the suppression of this evidence.

As to the hearsay objection it should be noted that after review of the transcript of the electronic surveillance, much of the material had no relevance to the proceeding and was therefore disregarded. This Court's focus in reviewing this evidence was twofold: first, those conversations between the Union officials as

to their reason for offering these Christmas gifts to the judges; second, those conversations between the judges and Union officials relating to these gifts. The latter situations were not hearsay statements. Insofar as these statements explain the judges' reason for the acceptance of the money or the Union officials' reasons for offering the money, these statements are properly characterized as verbal parts of an act and are therefore outside the hearsay rule.

> The legal significance of acts taken alone and isolated from surrounding circumstances may be unclear. Thus the bare physical act of handing over money to another person is susceptible of many interpretations. The possibilities include loan, payment of a debt, bribe, bet, gift, and no doubt many other kinds of transactions. Explanatory words which accompany and give character to the transaction are not hearsay when under the substantive law the pertinent inquiry is directed only to objective manifestations rather than to the actual intent or other state of mind of the actor.
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> McCormick, *Evidence* §249 (3d ed. 1984).

There were also numerous discussions between Union officials and members in which they discussed their plans to influence the judges. The statements tend circumstantially to show the state of mind of the speakers in offering the gifts and thus are admissible non-hearsay. *See Commonwealth v. Wright*, 455 Pa. 480, 317 A.2d 271 (1974); *Adoption of Harvey*, 375 Pa. 1, 99 A.2d 276 (1953); *Smith v. Smith*, 364 Pa. 1, 70 A.2d 630 (1950). *See generally*, 6 J. Wigmore, Evidence §1790 (Chadbourn rev. 1976).

III.

Having resolved the common legal issues, we now focus our attention on the facts and arguments unique to each of the respondents.

No. 115 In The Matter of the Honorable Kenneth Harris

Judge Kenneth Harris was elected to a ten-year term in the Court of Common Pleas of Philadelphia County commencing in January 1984. His term followed eight years of judicial service on the Municipal Court of Philadelphia.

Unlike the other respondents presently before us, Judge Harris has denied throughout the proceedings any receipt of money from the Roofers Union. The Board nevertheless found, on the basis of all of the evidence presented, that Judge Harris did in fact receive a cash gift of $300 from the Roofers Union in 1985. After reviewing the evidence, we are satisfied that the Board's finding is correct and that the testimony of Judge Harris and his witness, an aide by the name of Conrad Cheeks, was not credible.

In addition, the Board found that Judge Harris failed to disclose the receipt of this gift on the Statement of Financial Interest in contravention of Supreme Court Order No. 47. According to the Board, this omission, which it found to be deliberate, constituted a failure on the part of Judge Harris to conduct himself in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

We have discussed the duty of providing complete and truthful information on the financial disclosure in our recent decision in *In the Matter of Glancey*, _____ Pa. _____, 527 A.2d 997 (1987). Therein we stated that

"requiring the disclosure of gifts of a certain value is designed to assure the people of the impartiality and honesty of office holders, and to promote public confidence." *Id.* at _____, 527 A.2d at _____. Judge Harris' disregard of this Court's Order, see n.(16), as well as his numerous attempts to deny the acceptance of the gift compound the original dereliction. In our judgment, respondent's conduct must be met with the sanction of removal.

No. 116 In the Matter of the Honorable Julian F. King

Judge Julian F. King was charged with and found to have received cash gifts from the Roofers Union in 1983 ($200), 1984 ($200), and 1985 ($300). A judge on the Court of Common Pleas of Philadelphia since 1971, Judge King has not denied receipt of the funds and has indeed stipulated to this allegation. He failed to report receipt of the 1974 payment on his Statement of Financial Interest for that year,[20] although he did disclose receipt of the cash on his 1985 Statement, identifying the "Roofers Local" as the source of the payment. Based upon these findings, the Board concluded that respondent's conduct violated the Code of Judicial Conduct. We likewise conclude that respondent acted improperly in accepting cash from the Union and in failing to report the 1984 gift.[21]

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[20] The Supreme Court mandated disclosure for the first time in 1984. *See* Supreme Court Order 47 of the Judicial Administration Docket No. 1, dated April 13, 1984. Therefore no violation occurred in 1983 in this respect.

[21] The Board also charged Judge King with misconduct for invocation of his Fifth Amendment privilege against self-incrimination before the federal grand jury. However, it did not base a finding of misconduct upon this charge, and therefore we need not consider it at this time. *See* In the Matter of Glancey, _____ Pa. _____, 527 A.2d 997 (1987).

Respondent's acceptance of cash from the Union in three consecutive years evidences his intent to establish and maintain a relationship with the Union. Such a relationship offends the concept of judicial impartiality, and his failure to report receipt of the gift received in 1984 demonstrates his cognizance that his actions were improper. Accordingly, we find that Judge King's conduct in this matter warrants the sanction of removal.

No. 117 In the Matter of the Honorable Mitchell S. Lipschutz

Judge Mitchell Lipschutz is a judge of the Court of Common Pleas of Philadelphia County, having been elected to a ten-year term commencing in January 1986. Previous to his election to that court, he had served as a Municipal Court judge since 1980.

Judge Lipschutz was charged with receipt of $500 cash from Traitz in 1985 and with providing misleading information to FBI agents during their investigation of this matter. He disclosed the receipt of the cash on his Statement of Financial Interest for 1985. He responded to formal proceedings by the Board with a general denial of the charges, and has scrupulously avoided any explanation of the circumstances of the gift. Respondent was subpoenaed to appear and testify before a federal grand jury regarding receipt of this gift. He invoked his Fifth Amendment privilege against self-incrimination in refusing to answer whether he knew Traitz or Thomas Brown, or whether he received cash from Traitz.

Judge Lipschutz contends that his acceptance of the cash was separate from his judicial role and instead was accepted as a wedding gift from a friend. As we have previously stated, not all gifts are prohibited by the Code. A gift to a friend could be legitimate, but only if

the donee is able to establish (1) that the gift was given only in connection with that relationship and (2) that the donee is satisfied that the circumstances surrounding the acceptance of the gift would not create a reasonable basis for the donor to believe that the gift places the donor in a position to exert improper influence over the donee in the discharge of his legal duties.

There is absolutely no evidence of record to support the contention now offered that the gift was incident to Judge Lipschutz' wedding. He points our attention to select passages from the electronic surveillance transcripts in support of this position. Having reviewed these passages, we find they prove nothing more than a possible friendship between Traitz and respondent, and Traitz's knowledge of the judge's wedding. Instead, our review of the surveillance evidence discloses an intended plan by Union officials to influence judges of the Philadelphia court system. Nowhere has Judge Lipschutz been singled out to receive the gift of cash based solely on his purported friendship to Traitz.

In addition, we find the record devoid of evidence that respondent made it known to Traitz that this gift would not earn Traitz any special favor in respondent's courtroom. On this point we find it particularly interesting that Judge Lipschutz invoked his constitutional privilege against self-incrimination during the federal grand jury investigation, wherein he could have presented testimony as to his relationship with Traitz.[22] He was further presented with the opportunity to elaborate on this relationship during the FBI investigation. However, when agents questioned him

[22] We make reference to this conduct not as an independent basis for discipline, but instead to emphasize Judge Lipschutz's failure to meet his burden of proving the gift was proper as one incident to a friendship.

about whether he received cash from Traitz, he replied that he would "have to cudgel his memory." This background would certainly justify an inference that the instant "wedding gift" claim is one of recent fabrication.

This lack of candor in the instant proceedings unquestionably compounds the dereliction. A judge should refrain from acting in any way which might lead one to call into question his integrity. Clearly an active concealment of or the failure to provide pertinent information during an official investigation would undermine, not promote, the public trust bestowed upon a judge.

Judge Lipschutz has clearly failed to prove that the gift was proper. He has exacerbated the offense by exhibiting a complete lack of frankness with the federal authorities. We therefore accept the Board's recommendation and order the removal of Judge Lipschutz from office.

No. 119 In the Matter of the Honorable Thomas A. White

Judge Thomas White is a member of the Court of Common Pleas of Philadelphia County having been elected to a ten-year term commencing in January 1978. He has been charged, *inter alia*, with having received $300 cash from the Roofers Union in 1985, and with providing false information to FBI agents. The Board found that this conduct violated Article V, section 17(b) of the Pennsylvania Constitution and Canons 1, 2, and 5C(1) of the Code.

Judge White first contends that he did not accept the cash for his own use, and therefore his conduct was not prohibited. He claims that Brown left an envelope

containing the cash on his desk without his knowledge. Upon his discovery of the cash several days later, he had it converted to gift certificates which he then distributed to his office personnel. He attempts to distinguish his case from the other judges who he argues converted the Roofers' money to their own use. This contention is obviously specious. When one accepts a dominion over property that is offered and makes a judgment as to its disposition, it is of no consequence how he chose to use it.

Judge White violated the Code by his receipt of the money, enabling Roofers Union officials to entertain the impression that they were in a special position to influence him. His conduct tainted the integrity of his office. *See* Canon 2(B). His subsequent disposition of the cash could only absolve him of this wrongdoing if it had the effect of undoing the harm done, in other words, disabusing the donor of any notion that it would improperly influence him. There was no effort to eradicate the impression reasonably created by his acceptance of the money.

Respondent would also have us reject the Board's finding of misconduct with respect to his statements to FBI officials. Judge White responded negatively to the agent's question, "Did Tom Brown hand you an envelope. . . ." He claims that he did so because Brown placed the envelope on his desk and not in his hand. At the time, however, he knew that Brown had left cash in his chambers. Judge White describes his statement as a literally truthful response given in a stressful situation. Truthful perhaps, but still misleading. We have no doubt that Judge White understood or should have understood the import of the FBI inquiry. Thus he could have been

completely candid only by responding that although Brown did not hand him the cash, respondent did receive the same and disposed of it in the manner outlined previously.[23] In view of the foregoing derelictions, we find it appropriate that Judge White be removed from office.

No. 120 In the Matter of the Honorable William J. Porter

Judge William J. Porter has served on the Court of Common Pleas since 1971, and was elected to a ten-year term beginning in January 1984. In December of 1985, the Board found that respondent received a billfold type envelope from Thomas Brown containing $300 cash. Respondent disclosed receipt of the cash gift on his 1985 Statement of Financial Interest. The Board found that respondent received $300 cash from the Roofers Union, and concluded that the result of Judge Porter's conduct can only be a loss of public confidence in the integrity and impartiality of the judiciary and a loss of respect for the Court on which he sits.[24] We find that the conduct indulged in by respondent warrants the sanction of suspension and forfeiture of office.

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[23] Judge White also contests this conclusion on the grounds that no interview notes were produced by the FBI. *See* United States v. Harris, 560 F.2d 149 (3d Cir. 1977). He has nevertheless acknowledged the response in question, and thus the availability of the interview notes is irrelevant.

[24] Judge Porter had also been charged by the Board with violating the Code of Judicial Conduct because of his invocation of the Fifth Amendment to the United States Constitution during questioning before a federal grand jury regarding his relationship to the Roofers Union and the receipt of cash from the Union. The Board later dismissed this charge. We have addressed this issue in regard to Judge Lipschutz, above.

No. 122 In the Matter of the Honorable Michael E. Wallace

A judge of the Philadelphia County Court of Common Pleas, Judge Michael E. Wallace was elected to a ten-year term commencing in January 1978. He has been charged with receiving a cash payment of $300 from the Roofers Union in 1983 and 1985. He is also alleged to have provided false information to FBI agents in the course of their official investigation of this matter.

The Board found that respondent accepted $300 from Brown who, at the same time as he delivered the cash, invited respondent to a Christmas party at the Union hall. Respondent reported receipt of the cash on his 1985 Statement of Financial Interest.

The Board found that respondent accepted $300 cash from Thomas Brown in December 1983. Likewise, in December 1985, respondent accepted $300 from Brown who, at the same time as he delivered the cash, invited respondent to a Christmas party at the Union hall. Respondent reported receipt of the cash on his 1985 Statement of Financial Interest.

FBI agents interviewed respondent on February 13, 1986. The agents asked him if he knew "Tommy Brown," to which he replied that he did not. However, he did identify a photo of Brown as "Tom Brown, a person he knew from the courts." More importantly, respondent denied having received cash from Brown or Traitz in 1985, and told agents that Traitz had invited him to the Christmas Party during a telephone call.[25] We are satisfied that respondent has committed the violations charged by the Board and, based on this conduct, this Court finds it appropriate to impose the sanction of removal upon respondent.

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[25] We have elaborated on the impropriety engendered by providing false or misleading statements to FBI investigators, *supra*, with regard to Judges Lipschutz and White, and see no need to elaborate further.

No. 123 In the Matter of the Honorable Thomas E. Dempsey

Judge Thomas E. Dempsey is a member of the Municipal Court in Philadelphia, having been appointed to the bench in June 13, 1984 and elected to a six-year term commencing in January 1986.

On December 9, 1985, Thomas Brown gave respondent an envelope containing $300 in cash and told him "Merry Christmas from Steve." Brown invited respondent to a Christmas party at Roofers Hall simultaneous with giving Judge Dempsey the envelope. Respondent was found by the Board to have no social relationship with Traitz, although he was aware of Traitz's connection to the Union.

Judge Dempsey disclosed receipt of the cash on his 1985 Statement of Financial Interest. The Board found that respondent received $300 cash from the Roofers Union in December 1985, and concluded that the result of Judge Dempsey's conduct can only be a loss of public confidence in the integrity and impartiality of the judiciary and a loss of respect for the Court on which he sits. We have adopted the Board's findings regarding the violative conduct, and in view of the foregoing, this Court orders respondent's suspension with forfeiture of the office.

No. 127 In the Matter of the Honorable Mary Rose Fante Cunningham

Judge Mary Rose Fante Cunningham was elected to the Court of Common Pleas in November 1985 to a ten-year term beginning in January 1986. The conduct in question occurred while respondent was a judge-elect,

insofar as she accepted a $300 cash gift from Traitz on December 18, 1985, subsequent to her election to the bench, but prior to her induction.[26]

Judge Cunningham met with Traitz in the offices of the Roofers Union on December 18, 1985. During this meeting, at which Cunningham accepted $300 from Traitz, the following conversations were surveilled:

> ST: First of all, that's to help you with your campaign.
> MRC: Oh.
> ST: . . . clean your stuff up.
> MRC: Oh. Steve, thank you.
> ST: Merry Christmas.
> MRC: Thank you so much.
> ST: And if you need anything, give me a holler.
> MRC: Okay.

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[26] Judge Cunningham has asserted that Article V, section 17(b) and the Code are inapplicable to the activities of judges-elect. This contention is erroneous.

In *In re Greenberg*, 442 Pa. 411, 280 A.2d 370 (1971), this Court suspended Common Pleas Court Judge Stanley Greenberg, who, in 1970, had been found guilty of committing mail fraud during the period September 1961 to July 1965. The criminal conduct occurred prior to Judge Greenberg's appointment as a judge. However, the Board found that Judge Greenberg's conduct, notwithstanding its occurrence prior to his assumption of judicial responsibilities "prejudiced the proper administration of justice and brought the judicial office into disrepute." *Id.* at _____, 280 A.2d at 371. This Court agreed with both the findings and conclusions of the Board, and ordered the recommended disciplinary sanction. Thus there is no room to argue that Judge Cunningham should be accorded disparate treatment by this Court on the theory that she had not yet taken her oath of office when the transgression took place. The Board's finding that deleterious consequences to the judiciary will result on account of respondent's conduct is correct regardless of the actual date on which the conduct occurred, and therefore, discipline is properly imposed against respondent by this Court.

ST: And I'll, and I'll, maybe occasionally I'll call you and ask you for a favor, but I'll never, I'll never embarass you. I'll never come to you with any drugs or nothin' . . . .

MRC: I know it.

ST: . . . 'cause I don't (UI).

MRC: Well, you know, you know I'm going to juvenile.

ST: That's fine.

MRC: Which . . .

ST: Wherever you're . . .

MRC: It's a good place to start.

ST: Wherever you're goin', you're my friend.

MRC: I know.

Bd. Exh. 11, p. 3.

* * *

ST: That's right. And that's why, girl, you gotta be compassionate. Well, you are.

MRC: I'm gonna do my best.

ST: You'll do a hell of a job.

MRC: We'll do our best. This is goin' into my fund to pay my family off.

ST: That's for you. That's for you.

MRC: I shouldn't take it, but . . . it's goin' to my family. It'll go to my family.

ST: Right . . .

MRC: You know I have a loan to pay off.

ST: Let me help you with that. Give me, give me a legal letter . . .

MRC: Alright. What I think I'm gonna do is, after . . .

ST: (UI) and I'll go over to the Building Trades and it'll be . . . everbody's got a PAC.

MRC: After, after . . .

ST: (UI) PAC. That's . . .

MRC: We're gonna get somethin', ah, together, but we're not gonna do it till after the swearing in. They're gonna open . . . they're gonna close my committee down, open a new committee to retire the debt, and then they're gonna send letters out.

ST: You see that I get one. I'll . . .

MRC: Alright.

ST: . . . take it to Gillespie and I'll take it to the rest of the trades and I'll do the best I can.

MRC: Okay. 'Cause we're, we're tryin' to pay . . . I have a choice of either raising some more money to pay it off or paying it out of my salary. I owe, I owe one relative five and another relative five. I don't wanna pay it outta my salary.

ST: No. Yo. Let me help ya' with that legally.

MRC: Okay.

ST: Let me, do me a favor, buy yourself a Christmas thing with that. That's . . .

MRC: Alright.

ST: Nobody knows nothin' about that. What I, what I want to do is, give me a letter.

MRC: Okay.

ST: All, all, I know . . .

MRC: I mean, you didn't have to do this. But . . .

ST: I didn't do nothin'. It's nothin.

Bd. Exh. 11, p. 7, 8.

* * *

MRC: Ah, I'm gonna bring my husband with me to the luncheon Monday because . . .

ST: I'm lookin' forward to it.

MRC: He's interested, Steve, in runnin' two years down the road . . . for judge and I said to him, "Then you gotta come with me and meet the guys."

ST: I'm startin' a strong machine, here.

Bd. Exh. 11, p. 9.

* * *

Cunningham: And I, I'll remember my friends and . . . .

Traitz: I know you will and I'll, I'll never embarass you.

Cunningham: I know you won't. I know you won't.

Bd. Exh. 11, p. 23-24.

* * *

On February 11, 1986, respondent became aware that the Roofers Hall had been electronically surveilled. The next day FBI agents visited respondent at her home and informed her both that the Bureau was conducting an investigation into her receipt of the cash gift from the Roofers and that her conversation with Traitz had been electronically recorded. During this meeting with the FBI, Judge Cunningham admitted that she had in fact received an envelope from Traitz on December 18, 1985, containing $300 cash.

The Board found that respondent received $300 cash from the Roofers Union in December, 1985, and concluded that the result of Judge Cunningham's conduct can only be a loss of public confidence in the integrity and impartiality of the judiciary and a loss of respect for the Court on which she sits. We find that the evidence conclusively establishes that Judge Cunningham accepted the cash and further entered into an "illicit agreement" with Traitz. Her understanding with Traitz essentially permitted Traitz to seek judicial favors from respondent, who assured him that she would "remember my friends." The egregious nature of such a relationship cannot be tolerated.

Although Judge Cunningham did not engage in the attempted deception some of the other respondents employed, the gravity of her offense requires the most severe sanction available. The record is clear that an express agreement was made between this judge and Traitz, whereby members of the Union who appeared before the judge would receive "special understanding." Equally clear was that in return continuing special favors were to be received by the judge from the Union, *e.g.*, support in a future judicial candidacy of the

husband of the judge and additional moneys to cover outstanding campaign debts. A bond of allegiance was established and, in the process, justice was irretrievably compromised. For these reasons we accept the recommendation of removal.

Accordingly, in the matters at J.I.R.B. docket numbers 115, 117, 119, 120, 122, and 127, the recommendations of the Board are accepted, the respondents, pursuant to Article V, section 18 of the Pennsylvania Constitution, are herewith removed from the office of Judge, their salary shall cease from the date of the entry of this order and they shall hereafter be ineligible for judicial office.

In the matters at J.I.R.B. docket numbers 114 and 124 the respondents, pursuant to Article V, Section 18 of the Pennsylvania Constitution, are herewith suspended from the office of Judge, their salary shall cease from the date of the entry of this order and their office is declared to be vacant.

Mr. Justice Larsen did not participate in the consideration or decision of these cases.

Mr. Justice Zappala joins in this opinion and files a concurring opinion.

Mr. Justice Papadakos joins in this opinion and files a concurring opinion.

Final Report and Recommendation of the Board

IN THE SUPREME COURT
OF PENNSYLVANIA

JIRB DOCKET NUMBER 117

BEFORE THE JUDICIAL INQUIRY
AND REVIEW BOARD

COMMONWEALTH OF PENNSYLVANIA

IN THE MATTER OF:

THE HONORABLE THOMAS A. WHITE
COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

Board Hearing Docket Number 119

FINAL REPORT AND RECOMMENDATION OF THE BOARD

Respondent, the Honorable Thomas A. White, is a judge of the Court of Common Pleas of Philadelphia County. The Judicial Inquiry and Review Board, having conducted the necessary inquiry, investigation and formal hearing in this matter, has determined that Respondent has violated the Code of Judicial Conduct and is therefore subject to discipline.

PROCEDURAL HISTORY

This matter results from an inquiry initiated by the Board itself following public disclosures involving a federal labor racketeering investigation being conducted by the Federal Bureau of Investigation. Such disclosures included the return, on October 23, 1986, by a Federal Grand Jury sitting in Philadelphia, of a sixty-one count indictment charging 19 individuals associated with Roofers Union Local 30-30B with racketeering acts. Among other things, the Federal Grand Jury charged that the Union ran a Prepaid Legal Services Plan as an employee benefit plan, that it received kickbacks from the law firm which was hired to represent the Union and its members pursuant to this plan, and that the Union business manager, Stephen Traitz, Jr., and other Union representatives used the kickback money to make cash payments to public officials including a number of judges.

As a result of such disclosures, the Board initiated its own inquiry and, pursuant to the applicable federal procedural rules, requested access to the information developed in the federal investigation. The Board's request was granted by the federal courts on December 2, 1986.

A letter of inquiry pursuant to Rule 1(b) of the Rules of Procedure Governing the Board was issued to Respondent on November 28, 1986. The Board subsequently determined that formal proceedings should be instituted pursuant to Rule 2 of the Board's Rules. Formal charges were issued on December 12, 1986, and amended charges were filed on January 28, 1987. The Board filed a Rule 24 Petition recommending that Respondent be suspended without pay pending resolution of these proceedings, in response to which he was suspended with pay by the Supreme Court.

The Board charged the Respondent with violating the Constitution of the Commonwealth of Pennsylvania, Article 5, Section 17(b) which provides as follows:

> Justices and judges shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the Supreme Court.

The Board further charged Respondent with violating Canons 1, 2 and 5C(1) of the Code of Judicial Conduct which provide as follows:

Canon 1

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this code should be construed and applied to further that objective.

Canon 2

> A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities
>
> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or knowingly permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Canon 5C(1)

C. Financial Activities

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

These charges were based on factual allegations that Respondent had received cash from the Roofers Union in 1984 and 1985 and had provided false information to agents of the Federal Bureau of Investigation in the course of an official investigation. Charges relating to the alleged receipt of cash in 1984 were subsequently withdrawn.

The issues raised before the committee of the Judicial Inquiry and Review Board at the hearing held March 11, 1987, were (1) what were the circumstances surrounding Respondent's receipt of cash from the Roofers Union in 1985; (2) whether Respondent gave false information to the Federal Bureau of Investigation during the course of the Bureau's federal racketeering investigation of the Roofers Union; and (3) whether Respondent's receipt of cash from the Roofers Union in 1985 and any giving of false information violated Canons 1, 2 and 5C(1) of the Code of Judicial Conduct of the Commonwealth. Respondent appeared with counsel, presented legal defenses and character evidence and testified on his own behalf. Respondent admits the receipt of $300 cash from the Roofers Union in 1985 but testified that the moneys were given by him to a court aide to purchase gift certificates for the Respondent's staff and other court personnel. He denies furnishing false or misleading information to the Federal Bureau of Investigation in the course of an official investigation.

Following the Report of the hearing panel, the Board drafted its findings and report and served a copy upon Respondent pursuant to Rule 9 of the Board's rules. Respondent filed written objections pursuant to Rule 10 and he and his counsel appeared before the Board pursuant to Rule 11. The Board has considered Respondent's statement and objections in issuing this Final Report.

FINDINGS OF FACT

1. Respondent is a judge of the Court of Common Pleas of Philadelphia County (Board Exhibit 1). He was elected to a ten year term beginning the first Monday of January, 1978 (Board Exhibit 1; Tr. 80). In 1983 Respondent was assigned to the Motions Court Division of the Court of Common Pleas (Tr. 82).

2. Thomas Brown, a former employee of the Court of Common Pleas of Philadelphia, testified in a videotape deposition that, in 1985, he delivered a bank-type envelope containing $300 cash on behalf of the Roofers Union to Respondent (Board Exhibit 14, pp. 9-11, 19).

3. In December, 1985, Brown came to Respondent's chambers about 9:00 in the morning prior to the judge's arrival and without appointment or advance notice (Tr. 68, 85).

4. Respondent, who arrived several minutes later, had a busy day scheduled and had not yet opened or reviewed his mail (Tr. 85-86). The judge was alone with Brown for about a minute when the judicial secretary advised Respondent through the interoffice telephone that another judge had come to see him (Tr. 69-70). At that moment, Mr. Brown laid an envelope on Respondent's desk and perhaps said "Merry Christmas"

(Tr. 86). Respondent testified he believed the envelope contained a Christmas card (Tr. 87). He immediately ushered Brown out and met with the other judge (Tr. 86-87).

5. Two or three days later Respondent opened the envelope and discovered the $300 cash therein (Tr. 88, 126).

6. He testified that he did not at first know the source of the money and that, had he known when Brown delivered the envelope that it contained money, he would not have accepted it (Tr. 127, 132, 146).

7. Respondent placed the money in his desk drawer for a day or two (Tr. 89). By December 11 or 12, 1985, he assumed that the envelope and cash must have come from the Roofers Union (Tr. 127-128).

8. Respondent took no steps to return the money. He testified that he could probably have found out Tom Brown's address but did not at the time think it was important enough to spend the time on tracking down the address (Tr. 131-133, 158-159).

9. Respondent testified that he was embarrassed about the receipt of the cash and did not want any part of the money (Tr. 90, 153). Respondent gave the cash to his judicial aide with instructions to purchase gift certificates for members of the Respondent's staff and court personnel (Tr. 88-89).

10. Four gift certificates in the amount of $50 and four in the amount of $25 were purchased and given to court workers. The Respondent did not retain any of the certificates (Tr. 76-77, 88).

11. Respondent felt at that time that this was an appropriate way to dispose of the money (Tr. 88, 144, 152).

12. A week after the gift certificates were purchased and given, Respondent attended a Christmas luncheon at the Roofers Union Hall (Tr. 90-92) and saw Thomas Brown at the party (Tr. 129). He did not try to return the money to Mr. Brown at the party (Tr. 129). In Judge White's mind, at that time, the money had already been appropriately disposed of by the purchase and distribution of the gift certificates (Tr. 144).

13. On February 12, 1985, Respondent was interviewed in the presence of his wife by two agents of the Federal Bureau of Investigation concerning a federal investigation of the Roofers Union (Exhibit 12, Tr. 94-95).

14. The FBI 302 report of the interview with Judge White stated as follows:

> JUDGE WHITE believes that he last saw BROWN at the LOCAL 30 Christmas party. He did not recall an instance in early December, 1985, wherein BROWN visited him at his chambers for the purpose of dropping off a white envelope containing a $300.00 cash gift from TRAITZ. He denied receiving any such gift or any other gratuities.

15. Respondent testified, however, that the agents actually asked, "Did Tom Brown hand you an envelope . . ." and the Respondent answered in the negative because Brown placed the envelope on his desk and not in his hand (Tr. 86, 97-98, 136). It was stipulated that Respondent's wife, who was present at the interview, would corroborate this testimony (Tr. 162).

16. Respondent understood that the agents were interviewing him in connection with Tom Brown and the Roofers (Tr. 135). He testified that he answered the agent's question as it was asked, but he erred in not being more forthright (Tr. 139-140).

17. The Board finds that Respondent knew that the FBI was attempting to find out whether he had received money from Brown and that the question whether the envelope was placed in his hand as opposed to on his desk was not relevant to the inquiry in any way. Therefore, Respondent's response amounted to an intentional false statement.

18. Shortly after his interview with the federal agents, Respondent, through counsel, offered to be re-interviewed by the Bureau (Tr. 99, Exhibit A). This request was denied on May 30, 1986 (Tr. 100-101; Exhibit B).

19. Respondent appeared before the federal grand jury on August 14, 1986, and answered all questions posed to him without reservation or equivocation (Board Exhibit 12; Tr. 102).

20. In response to another grand jury subpoena, Respondent appeared at the office of the Federal Bureau of Investigation and voluntarily provided handwriting samples and voice exemplars (Tr. 10).

21. Respondent on May 1, 1986, disclosed the receipt of the $300 cash on his financial disclosure form for the calendar year 1985 by stating that he "assumed at the time . . . [the $300] was from the Roofers Union. . . ."

22. The donor and/or its members were and are potential litigants before the Court in which Respondent serves.

23. Based on clear, convincing and credible evidence before it, the Board finds that Respondent accepted $300 cash from the Roofers Union and intentionally provided false information regarding the cash to the Federal Bureau of Investigation in its official investigation into the activities of the Roofers Union.

24. The result of Respondent's conduct can only be a loss of public confidence in the integrity and impartiality of the judiciary and a loss of respect for the Court on which he serves.

DISCUSSION

For discussion, see the Opinion of the Board which is incorporated herein and filed as an appendix to this Final Report.

CONCLUSIONS OF LAW

1. Under the totality of the circumstances presented in this case, Respondent's receipt of cash constitutes a violation of Canons 1, 2 and 5C(1) of the Code of Judicial Conduct.

Canon 1

Canon 1 of the Code of Judicial Conduct reads as follows:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this code should be construed and applied to further that objective.

2. Receipt and use of $300 cash under the totality of circumstances presented in this case constitutes a failure to observe the high standards of conduct which are essential to preserve the integrity and independence of the judiciary.

3. The fact that Respondent furnished false and misleading information to agents of the Federal Bureau of Investigation during their official investigation of activities of officers and members of the Roofers Union constitutes a failure to observe the required high standards of conduct and impairs the integrity and independence of the judiciary.

Canon 2

Canon 2 provides: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or knowingly permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

4. The receipt and use by Respondent of $300 cash under the totality of circumstances in this case constitutes a failure by him to conduct himself in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

5. Respondent's deliberate misrepresentation of facts to agents of the Federal Bureau of Investigation, during their official investigation of officers and members of the Roofers Union constitutes a failure by Respondent to conduct himself in a manner promoting public confidence in the integrity of the judiciary in violation of Canon 2A.

6. The receipt and use by Respondent of $300 cash under the totality of the circumstances presented in this case conveyed to the donor the impression that it or its members were in a special position to influence him.

Canon 5C(1)

Canon 5C(1) provides:

C. Financial Activities

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

7. The receipt and use of $300 cash by Respondent under the totality of the circumstances presented in this case reflects adversely on his impartiality and constitutes an exploitation of his judicial position.

8. The following objections made by Respondent during these proceedings are sustained:

a. The objections to the admissibility of the Pennsylvania Crime Commission Reports.

b. The objections to the admissibility of the compilations of newspaper articles.

9. All other motions, objections, and exceptions made by Respondent during the course of these proceedings are denied and overruled.

SANCTIONS

Discipline pursuant to Article V, Section 18, of the Pennsylvania Constitution is required as a result of Respondent's violations of the Canons for the following reasons:

1. The Board has unanimously concluded that Respondent's conduct has violated the Code of Judicial Conduct as set forth above.

2. The purpose and objective of the Code of Judicial Conduct is, as stated in Canon 1, to preserve the integrity and independence of the Judiciary. Respondent's failure to comply with both the letter and the spirit of the Canons has severely impaired our judiciary's efforts to obtain these goals.

3. Respondent's conduct has violated not only the Canons of Judicial Conduct but has also violated the general moral and ethical standards that can reasonably be expected of judicial officers by the public.

4. The result of conduct such as that engaged in by Respondent can only be a loss of public confidence in the integrity and impartiality of the judiciary and a loss of respect for the Court on which he sits.

Therefore, six members of the Board recommend the removal of the Respondent from the office of judge. Two members of the Board would recommend public admonishment and the suspension of Respondent without pay for a period of one year. Judge McEwen (1) joins in the minority position that the sanction of removal from the Bench is too severe, (2) joins in the minority recommendation that Respondent undergo public censure by the Supreme Court of Pennsylvania, and (3) joins in the minority recommendation that Respondent be suspended from judicial office without compensation, but (4) the term of suspension be for less than one year.

CERTIFICATION

The foregoing constitutes the determination of the Judicial Inquiry and Review Board and, pursuant to Rule 16 of the Board's Rules of Procedure, is hereby filed with the Supreme Court of Pennsylvania.

ROBERT L. KEUCH
Executive Director and
General Counsel

Date: August 5, 1987

Exhibit "A" Annexed to Final Report and Recommendation of the Board

BEFORE THE JUDICIAL INQUIRY AND REVIEW BOARD

COMMONWEALTH OF PENNSYLVANIA

IN THE MATTER OF:

THE HONORABLE MARY ROSE FANTE CUNNINGHAM COURT OF COMMON PLEAS PHILADELPHIA COUNTY	Board Hearing Docket Number 127
THE HONORABLE THOMAS E. DEMPSEY MUNICIPAL COURT PHILADELPHIA	Board Hearing Docket Number 123
THE HONORABLE KENNETH E. HARRIS COURT OF COMMON PLEAS PHILADELPHIA COUNTY	Board Hearing Docket Number 115
THE HONORABLE JULIAN F. KING COURT OF COMMON PLEAS PHILADELPHIA COUNTY	Board Hearing Docket Number 116
THE HONORABLE MITCHELL S. LIPSCHUTZ COURT OF COMMON PLEAS PHILADELPHIA COUNTY	Board Hearing Docket Number 117
THE HONORABLE WILLIAM J. PORTER COURT OF COMMON PLEAS PHILADELPHIA COUNTY	Board Hearing Docket Number 120
THE HONORABLE THOMAS N. SHIOMOS COURT OF COMMON PLEAS PHILADELPHIA COUNTY	Board Hearing Docket Number 121
BERNARD J. SNYDER	Board Hearing Docket Number 130
THE HONORABLE MICHAEL E. WALLACE COURT OF COMMON PLEAS PHILADELPHIA COUNTY	Board Hearing Docket Number 122
THE HONORABLE THOMAS A. WHITE COURT OF COMMON PLEAS PHILADELPHIA COUNTY	Board Hearing Docket Number 119

BOARD OPINION

HOYLE, Board Member.

The core question before us that is common to each of these cases is the same: whether a judge's acceptance of cash in an unmarked envelope in private from the head of an organization which is a potential litigant before him violates the Code of Judicial Conduct; and, if so, what sanctions are appropriate in view of the attendant circumstances which differ from case to case. Specifically, the Board has found that each respondent accepted, in private, an unmarked bank type envelope[1] containing $200, $300 or $500 cash from Stephen Traitz, Jr., or his messenger, and that the union, of which Traitz was an official, or its members were potential litigants before the Respondent's Court. Respondents' counsel have argued that these findings do not constitute a violation of the Code of Judicial Conduct. Accordingly, the Board should first come to a decision regarding this threshold question.

In Article 5, Sections 17 and 18 of the Pennsylvania Constitution, the Judicial Inquiry and Review Board and Supreme Court of Pennsylvania are charged with the responsibility of disciplining judges who "violate any canon of legal or judicial ethics prescribed by the Supreme Court." Pa. Const. Art. 5, Section 17(b).

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[1] For purposes of this discussion, "unmarked envelope" signifies an envelope that is pre-printed with the words "Seasons Greetings" but which does not identify the giver in any way.

The applicable canons read as follows:

CANON 1

A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or knowingly permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

CANON 5
A JUDGE SHOULD REGULATE HIS EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH HIS JUDICIAL DUTIES

* * *

C. Financial Activities

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

The removal or other discipline of a judge has serious personal consequences for the individual. Because of the Code's admittedly general nature, it is essential that any discipline be fair in light of a judge's reasonable, good faith interpretation of the Code. As the Supreme Court stated in *Matter of Dalessandro*, 483 Pa. 431, 397 A.2d 743 (1979):

> Of necessity, the Canons of Judicial Ethics are written in broad language. Prohibitive canons or rules, or laws of any kind written with such a broad brush, give very little notice to those affected regarding the kinds of specific conduct prohibited. Nor can it be otherwise. It would be impossible to conceive of, or specifically enumerate, every situation which might arise. The broadness of the Canons must certainly be considered in determining the degree of notice afforded a judge consistent with due process of law.

Id. at 448-9, 397 A.2d at 751. In making a determination regarding the degree of notice each judge may have had regarding the impropriety of accepting this money, it must be conceded that the Code cannot be read and

understood at all in a moral vacuum; its general language regarding ethics necessarily draws on a knowledge of moral standards. Every judge knows, or ought to know, that refraining from improperly accepting gifts or favors from potential litigants is undoubtedly one of the most important means of giving effect to the Code of Judicial Conduct—to secure both actual impartiality and the appearance of impartiality in a judge's adjudicative responsibility. In particular, a widespread public perception that judges are "on the take" is without doubt the single most effective means of destroying public confidence in the judicial system. It is difficult to conceive of any litigant who would believe that he could receive a fair trial if he knew that the judge had accepted money from his opponent, even if no specific *quid pro quo* had been arranged. Gifts necessarily tend to create a feeling of obligation in the recipient which in some cases may, consciously or unconsciously, tend to sway the judgment; and, even if a judge is able to remain perfectly impartial in spite of the relationship created by the gift, the appearance of impropriety may operate to destroy public confidence in the judiciary just as effectively as proof of actual bias in the disposition of a case. Clearly, the issue of receipt of gifts by judges is so vital to the preservation of the judicial system that a standard of strict scrutiny of such gifts is absolutely necessary to assure that they do not violate the Code of Judicial Conduct. Further, if one applies a balancing test, weighing the judge's interest in being perfectly free in all circumstances to accept gifts from non-relatives versus society's interest in being assured of judges unswayed by personal financial interest in the outcome of their decisions, there can be no question about the outcome. The former is minuscule in comparison with the latter.

Respondents' counsel have argued that the fact that the current Canons do not specifically forbid the receipt of gifts from potential litigants means that receipt of the cash gifts at issue here does not violate the Code. A judge is not immune from discipline simply because the Code of Judicial Conduct in force in his state does not specifically address the exact behavior at issue. As the court noted in *Keiser v. Bell*, 332 F. Supp. 608, 615 (1971), *quoting from Sarisohn v. Appellate Division*, 265 F. Supp. 455 (D.C. 1967), " 'it would be impossible to enumerate in any statute all the possible grounds' for removal of a judicial officer. 'Guidelines may be found in the Canons of Ethics, applicable to both attorneys and judges, adopted by the American Bar Association and other Bar Associations, and also in the general moral and ethical standards expected of judicial officers by the community.' (265 F. Supp. at 458.)" *See also Dalessandro, supra.* To require the Code of Judicial Conduct to define every possible species of unacceptable behavior would be to require the Judicial Inquiry and Review Board to leave judges on the bench who had destroyed their own credibility in the eyes of the public simply because the specific behavior in which they had engaged was not explicitly proscribed.

The codes of judicial conduct of 48 United States jurisdictions, including our own, are based on the ABA Model Code of Judicial Conduct. The Code was designed to provide reasonably specific guidance for a judge, but it presupposes in the individual judge an ability to translate canons that focus on the spirit and purpose of the regulation of judicial conduct into the circumstances of his daily life. The Code assumes that a judge has the moral sensitivity to understand the spirit of the Code and further that he has the ability to understand ethical

standards and apply them in his daily life to protect both his own impartiality and his appearance of impartiality in the public eye. Because of the judge's position of authority and the urgent necessity to preserve this actual and perceived impartiality in the judicial function, a judge who cannot perceive that he must be extremely particular about the gifts he accepts from potential litigants and is ignorant of moral standards on such an issue is not qualified to hold the office he occupies. That the area of the receipt of gifts is sensitive, is one that requires serious thought, and is one where it is better to lean toward the side of non-acceptance in doubtful cases, seems too obvious to state.

Further, although there is no reported case with the same fact situation, case law establishes with absolute clarity that improper gifts violate the Code. The question of whether or not acceptance of a money gift can violate Canons 2 and 5(C)1 of the Canons of Judicial Conduct now in force in the Commonwealth of Pennsylvania was directly addressed by the Pennsylvania Supreme Court in *In Re Dandridge,* 462 Pa. 67, 337 A.2d 885 (1975). There, a judge accepted the net proceeds from a testimonial dinner in his honor for his own personal use. In responding to the Board's finding of misconduct in accepting the gift, the judge attempted to argue from the fact that Canon 32, the provision in the previous code of judicial conduct expressly prohibiting receipt of such gifts, was not adopted in the current code, that therefore the current code did not apply to his receipt of the gift. Canon 32 read:

> A judge should not accept any presents or favors from litigants, or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment.

425 Pa. xxiii-xxxvi. The Court in *Dandridge* stated in response to this argument:

> Although the language of Canon 32 does not survive in the new code, *the earlier prohibition against accepting improper gifts is encompassed in the language of new Canon 5, Subd. C(1)*:
>
> > A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.
>
> More persuasively, the present Canon 2 ["a judge should avoid impropriety and the appearance of impropriety in all his activities,"] was clearly intended to carry forward the proscription of old Canon 32 as applied to a matter such as the evidence discloses in this case.

Dandridge, supra, 462 Pa. at 73, 337 A.2d at 888 (emphasis added).

The court also quoted with approval language from the Reporter's Notes to the current American Bar Association Model Code of Judicial Conduct, which states with reference to the acceptance of gifts permitted under the ABA Code, "the judge must keep in mind, however, that the standard of impropriety and the appearance of impropriety in Canon 2 is applicable to this area of his conduct." *Id.*[2]

[2] Respondents have attempted to revive an argument which was rejected in *Dandridge*, by pointing out 1) that the Supreme Court deleted ABA Canon 5(C)4, which is specifically framed to give judges precise guidelines regarding the acceptance of gifts, when it adopted our present Code of Judicial Conduct—a code otherwise based very closely on the ABA Model Code; and 2) that Canon 32 of the old code, which also dealt with the gifts issue, was not incorporated in the present Code. These omissions were unfortunate, but the Supreme Court has made it clear that the acceptance of improper gifts in Pennsylvania is covered by the language of Canons 2 and 5(C)1.

Further evidence of the Court's intent on the question of the receipt of gifts by judges is its adoption of Supreme Court Order 47, Judicial Administration Docket Number 1, April 13, 1984. Order 47 imposes an annual financial disclosure requirement on the judiciary. Question 11 of the Statement of Financial Interest which each judge is required to complete for each calendar year requires that the judge list all gifts of cash or property in the amount of $200 or more received during the year together with the source of each gift, the address of the source, and the reason for the gift. As respondents have pointed out, the Supreme Court's Order 47 does not forbid gifts of over $200; it merely requires that they be reported. This clearly implies that in some situations, gifts in such amounts are allowable. However, respondents have taken the position that the fact the judges are required to report gifts of over $200 means that *all* such gifts are acceptable as long as they are reported.

If the respondents' position were correct, a judge could take money in any amount from any interest group for his personal use and could immunize himself from discipline simply by reporting the gift. It is undeniable that the Code demands that a judge regulate his private life to promote public confidence in his integrity and impartiality. If the Supreme Court were to embrace respondents' interpretation of the intent of Order 47, it would give the green light to a world where judges would routinely report money gifts from an increasing number of potential litigants. It is impossible to suppose that this would not seriously undermine the public's confidence in the impartiality of the judiciary. Further, the Supreme Court has stated in *Kremer v. State Ethics Commission*, 503 Pa. 358, 469 A.2d 593 (1983), that its Code of Judicial Conduct and any rules it promulgates

regarding financial disclosure provisions for judges "advance the interests that the Ethics Commission seeks to serve through application of the Ethics Law." *Id.* at 363, 469 A.2d at 595-96. The purpose of the financial disclosure requirement in the Ethics Law is as follows:

> Section 401. Purpose.
> The legislature hereby declares that public office is a public trust and that any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that trust. In order to strengthen the faith and confidence of the people of the State in their government, the Legislature further declares that the people have a right to be assured that the financial interests of holders of or candidates for public office present neither a conflict nor the appearance of a conflict with the public trust. Because public confidence in government can best be sustained by assuring the people of the impartiality and honesty of public officials, this act shall be liberally construed to promote complete disclosure.

65 P.S. §401.

This statement of purpose demonstrates that financial disclosure is meant to *assure* the public that the official's financial interests do *not* conflict or appear to conflict with the public trust. It is not, as respondents argue, merely intended to serve as a warning to the public of conflicts with the public trust the official has created for himself. Canon 5 states that "[A] judge should regulate his extra judicial activities to minimize the risk of conflict with his judicial duties." Acceptance of gifts from potential litigants, even where duly reported, runs directly contrary to the intent and purpose of Canon 5.

In summary, case law, policy analysis, and common sense all demonstrate that improper gifts to judges may indeed constitute very serious violations of the Code. This brings us to the heart of the issue: were the cash gifts at issue here improper under Canons 1, 2 and 5(C)1, and if so what was the degree of seriousness of the violation of these Canons?

An analysis of whether the Canons have been violated properly includes an analysis of the factors which operate to determine the significance of the gift "in the general moral and ethical standards expected of judicial officers by the community." *Keiser, supra*, 332 F. Supp. at 615. To determine on which side of the line the gifts at issue here fall in light of the Canons, one must analyze the significance of the gift in our society, both as between donor and donee, and in the eyes of the public should it become aware of the gift.

Respondents have repeatedly urged that the money at issue here is nothing more than a "token holiday gift" either by Steve Traitz as a personal friend or from the Roofers Union. These arguments have no merit. First of all, in the context of holiday gift-giving, $300 or $500 is hardly "token"; and where is it customary for co-equal friends to exchange gifts of money at Christmas time? The fungible nature of money would render such a practice ludicrous. Likewise, generally business gifts are not made in cash. Further, the obvious purpose of business Christmas gifts is to create a relationship of goodwill that may lead to favorable consideration of the donor in a business context. Such a purpose, while perfectly acceptable in business circles, is grossly improper in a case where the recipient is a judge. The only situation where business gifts of money are customarily given at Christmas time is in a case where

the donor has received services from the recipient throughout the year for which he wishes to give some extra recognition beyond the recipient's ordinary salary: for instance, boss to secretary, house owner to a paper delivery person, and so on. To analogize the gifts here to a practice of this sort similarly underlines the egregious impropriety of accepting these cash gifts. Certainly, beyond the bare assertion that this money was a "token holiday gift," respondents have introduced no evidence that the money was given under any additional circumstances which would change the obvious conclusion that the acceptance of the money in these circumstances was improper in the extreme.[3]

Counsel for one respondent has also correctly pointed out that judges do, by custom, receive certain kinds of gifts and favors from entities that in fact may come before the courts on which they serve, and that some of these gifts may be worth around $300. These gifts are sharply distinguishable from those at issue here. Such gifts or favors are intended, received, and publicly perceived as purely honorific in nature. As a society, we wish to show respect and honor for the judiciary, generally by respectful and deferential behavior, but also occasionally by gifts of an appropriate kind—in other words, gifts that are perceived by all concerned as purely honorific and not affecting the judge in the exercise of his adjudicatory powers. For instance, judges and other public officials in Philadelphia are eligible to receive free or discounted tickets to certain concerts, games, and other events. Further examples of commonly accepted

[3] Judge Lipschutz's counsel did try to argue that the money was a wedding gift, but there was no evidence to this effect in the record beyond the bare arguments of counsel.

exceptions to the general rule against acceptance of gifts by judges are enumerated in Canon 5(C)4 of the ABA Model Code of Judicial Conduct:

> (a) A judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a Bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;
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> (b) A judge or member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;
>
> (c) A judge or member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and, if its value exceeds $100, the judge reports it in the same manner as he reports compensation in Canon 6(c).

Are the gifts at issue similar in import to those which are accepted by custom and are not seen as having any impact on a judge's impartial performance of his adjudicative responsibilities, or do they operate in a manner contrary to the clear intent of Canons 1, 2, and 5(C)1? Factors relevant in determining the significance of a gift in this context include the kind of gift; the selectivity with which it is given; the circumstances under which the gift was given; and its actual dollar value.

With respect to the first element, the gifts at issue here took the form of money. Money is undoubtedly the most problematical, suspect form of gift where the recipient is a person who has received past or potential adjudicative power over the donor in consequence of a public trust. Because of its unlimited usefulness, its ability to be accumulated, and the ease with which it is convertible to acquire whatever the recipient most desires, money has long been associated with corruption. In-kind, consumable, non-transferable items such as tickets are less likely than money to create an inference of an improper significance because, although they do have a dollar value, they have a limited usefulness and do not possess the numerous desirable characteristics of money. Further, the gifts in question took the form of cash, which, because it is difficult to trace to its source, is particularly suspect.[4]

The second element determinative of the significance of such a gift is the selectivity with which it is given. Gifts such as the free or discounted tickets or law books supplied to a judge on a complimentary basis by the publisher are well known to be supplied traditionally on an across-the-board basis to all judges without respect to their possible disposition of any case before them. The Roofers Union gifts were delivered to only a small percentage of judges in Philadelphia county. Certainly the recipients had no reasonable indication that the gifts were given to all judges indiscriminately without respect to their past or future adjudication of cases. The envelopes were simply delivered "out of the blue" as personal gifts.

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[4] This discussion of cash gifts should not be interpreted to mean that a judge's acceptance of non-cash gifts from lawyers, litigants or potential litigants is necessarily proper.

Another factor to consider is the open, publicly acknowledged nature of the gift. Again, gifts that are viewed as acceptable because merely honorific in nature, such as law books or free tickets, are commonly made without any indicia of secrecy. In contrast, the gifts at issue here were hand-delivered in unmarked envelopes with no indication other than what was orally communicated about the source of the gift.

A final factor in this analysis is the actual dollar value of the gift. Obviously, there is a point below which even a cash gift is insignificant—for instance, the acceptance of a quarter for a parking meter when a judge is out of change would undoubtedly be *de minimis* in the context of the Board's disciplinary responsibilities. As counsel for respondents have pointed out, $300 or even $500 is not a great deal of money in comparison with the $23,500 gift at issue in *Dandridge*.[5] Nevertheless, it is clearly significant. The best objective evidence of this is the fact that, on the financial disclosure statement which each judge is required to file, gifts of over $200 per

[5] Respondents have stressed that in *Dandridge*, *supra*, the Court implied a distinction between the $23,500 gift at issue there and "a token or memorial gift such as is usually given at dinners or other occasions honoring individuals." 462 Pa. at 70, 337 A.2d at 886. Respondents seek to equate the $300 cash gifts at issue here with such "token or memorial" gifts. This argument is unconvincing. As this analysis shows, the significance of gifts in society is determined by a number of factors, not just one. *Dandridge* dealt with an open, publicly acknowledged gift in a setting—the testimonial dinner—that traditionally has been seen as a proper way for society to honor a distinguished judge. See, for instance, the ABA Model Code's Canon 5(C)4, which makes an exception to its general anti-gift strictures in favor of a judge's receipt of a gift at a testimonial dinner. In the *Dandridge* situation, the amount of the gift was an important factor in causing the impropriety. Those circumstances were completely unlike those before us here, which involve the receipt of cash in private in unmarked envelopes.

annum must be listed because gifts of over that amount are seen as of concern to the public as possibly influencing a judge in his official conduct.

This analysis shows conclusively that gifts that are publicly known and accepted as not impinging on the adjudicative function are completely different in character from the gifts at issue here.

Therefore, the application of the language of Canons 1, 2, and 5(C)1 to the respondents' behavior here must result in a finding of violation of all three Canons. As we have seen, a standard of strict scrutiny toward any gift is necessary and appropriate to preserve the intent of the Canons. The receipt of a $300 cash gift from a union official whose union is a potential litigant before the Court tends to undermine a judge's ability to exercise independent judgment when the union or its members appear before him and thus violates Canon 1's behest that "a judge should himself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved."

The applicable language of Canon 2 is as follows: "a judge should avoid impropriety and the appearance of impropriety in all his activities. . . . A judge should . . . conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. . . . [A judge should not] convey the impression that [others] are in a special position to influence him." The question of whether the receipt of a cash gift under the circumstances at issue here violates Canon 2 is one that answers itself. We are dealing here with cash payments from a union official delivered privately in unmarked envelopes to judges who may sit in judgment on the union's members and associates. The acceptance of cash in these circumstances goes beyond the creation

of an appearance of impropriety; it attains the appearance of corruption. Certainly the public has the right to expect that its judges will have the minimal amount of moral fiber to refuse to accept cash in these circumstances.

Finally, under Canon 5(C)1 as interpreted in *Dandridge*, respondent's receipt of this money falls into the category of "financial ... dealings that tend to reflect adversely on his impartiality."[6]

Board counsel has urged the Board to consider the reputation of the donor in determining whether improper judicial conduct has occurred, and respondents have objected to the use of such evidence. Leaving aside the

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[6] As previously noted, the Supreme Court has specifically stated in *Dandridge, supra*, 462 Pa. at 73, 337 A.2d at 888, that the "prohibition against accepting improper gifts" falls within the language of 5(C)1, so that receipt of a gift is a "financial dealing" within the meaning of this canon.

Further, with respect to the interpretation of Canon 5(C)1, Board counsel and respondents have argued on the subject of whether or not the Roofers Union is "likely to come before the Court on which [the judge] serves." As respondents have correctly pointed out, the acceptance of a $300 cash gift does not easily fit under the heading of dealings that "tend to ... involve [the judge] in frequent transactions with lawyers or persons likely to come before the court on which he serves." However, the violation has occurred because the acceptance constitutes a dealing that "tends to reflect adversely on [the judge's] impartiality," so that the disputed phrase of Canon 5(C)1 is not applicable. However, the fact that the donor of the gift is a potential litigant is necessarily one factor in creating the set of circumstances that makes this transaction "tend to reflect adversely" on the judge's impartiality. Obviously, if it were apparent to the judge and to the public in general that the donor's interests would never come before the judge for adjudication, the impropriety of accepting would be greatly lessened or done away with altogether. Conversely, the fact that neither judge nor public could have any reason to suppose that the donor would be unlikely to come before the judge's court is one of several important factors creating the impropriety with which we are dealing today.

difficulties of determining the reputation of a person or organization, basing disciplinary action for receiving a cash gift in part on the donor's reputation is problematical to the extent that this might be construed as a statement by the Judicial Inquiry and Review Board that the receipt of money gifts from "reputable" persons or organizations are more permissible than those from organizations or people who are perceived as being less reputable. It is a judge's duty to dispense justice; and this means he must treat fairly and even handedly *all litigants* whatever their backgrounds, reputation, beliefs, or prior actions. Ideally, we want our judges to render judgments with wisdom—to have an idealistic belief in the law and its impartial application to all members of society, tempered by the practical realism and compassion that is based on an understanding of the problems and human weaknesses of all sorts and conditions of men. To encourage a judge to identify his interests with the "reputable" (which is often interpreted as synonymous with the powerful and elite), would be to weaken the judiciary rather than to strengthen it. The acceptance of money under the circumstances at issue here would be a violation of Canons 1, 2, and 5(C)1 regardless of the reputation or background of the donor.

It is necessary to address one last argument offered by counsel to justify the respondents' acceptance of money in these circumstances. This argument is that, in effect, the threat to actual impartiality and the appearance of impartiality created by such a gift is *de minimis* in comparison with the threat to actual impartiality and the appearance of impartiality inherent in our system of electing judges. Without doubt, the current election system presents a serious threat both to a judge's ability to be impartial and to the appearance of his impartiality to the public. Because a

candidate or incumbent judge depends almost entirely on the support and campaign contributions of potential litigants or lawyers, a judge's expectation of obtaining and retaining his job depends on creating and keeping the good will of particular people and organizations who are or may become his supporters. Indeed, he must not only accept such support but must go out and solicit it; and, due to public disclosure laws, each judge knows exactly who his financial backers are and how much they have given. Should one of his key supporters appear before him, there must be times when it is not easy for a judge to maintain actual impartiality, nor can it be easy for litigants on the other side of the case or for the public to believe in his impartiality under such circumstances. As one of our most distinguished jurists, retired president judge of the Pennsylvania Superior Court Edmund B. Spaeth, Jr., who himself came through the elective process, recently stated in a wise and eloquent article:

> Of course, it isn't impossible for an elected judge to be independent—but it's hard. The point is institutional, not personal. In designing any institution, we should provide against our weaknesses. If your job depends on popular approval, you will find it hard to do something unpopular. And you may be tempted to do something wrong.

The Philadelphia Inquirer, May 4, 1987, Sect. A, p. 11.

One must agree that in deciding that the acceptance of cash gifts is a violation of the canons for the policy reasons discussed above, one is very much in the position of "straining out the gnat but swallowing the camel." In the process of holding these hearings, one had to be greatly struck by the testimony of judges about the realities of the election process, particularly with

respect to the power of the unions in judicial elections. Because a judge is restrained by Canon 7 of the Code from making campaign promises about his conduct in office other than "the faithful and impartial performance of his duty" and from announcing his views on "disputed legal or political issues," the public in general usually has no idea which candidate is which, and judges ride into office on the coattails of other, high visibility candidates on the ticket. The Board heard testimony that in Philadelphia the unions have been able to step into the vacuum this system has created because of their power of organizing their members, securing their members' assistance in the campaigning process, and suggesting for whom to vote. There has been significant testimony that a judge cannot hope to win an election in Philadelphia without securing the favor of the unions. For instance, one judge testified as follows:

> Q. Based on your experience, was the support of organized labor, in fact, the prevailing factor in winning the election?
>
> A. Yes. It became more important in other aspects in later years. In that year they were particularly supportive with campaign funds.
>
> Q. Given the political structure in Philadelphia in a judicial election, do candidates find it important to have the support of organized labor?
>
> A. In my opinion, you can't win without them.
>
> Q. Is that the thought of other judges in Philadelphia?
>
> A. I think every judge on the bench thinks that.

Another judge testified to the same effect:

> "You need union labor if you want a shot at winning."

Naturally, a situation where our judiciary in Philadelphia is *de facto* largely dependent on the good will of one interest group is one of serious concern. However, respondents' argument that, by condemning the acceptance of cash in these circumstances, the Judicial Inquiry and Review Board is "seeking to create a new rule that may call into question the solicitation, receipt, and acceptance of virtually every campaign contribution by a judicial candidate" lacks all merit. The election system, flawed as it may be on both a practical and theoretical level, nevertheless is rife with provisions that are designed to prevent corruption and the appearance of corruption with regard to campaign contributions, and which must operate to put judges on notice that they may not blithely accept any and all cash presents from campaign supporters. For instance, it is due to concerns about corruption that campaign contributions for all elected public officials must be scrupulously accounted for under 25 P.S. §3241 *et seq.* Further, because of our society's special concern that a judge, more than any other public official, be free of the perceived taint that money brings when given by persons who may come before the judge as litigants, Canon 7 of the Code of Judicial Conduct requires that the candidate "should not himself solicit or accept campaign funds" but instead must delegate all such necessary responsibilities to his campaign committee. Finally, with respect to the cash nature of the gifts in these cases, one must note that the Election Code, of which each judge must be aware, forbids any person to contribute cash in excess of $100 with respect to any candidate for election. 25 P.S. §3254(c).

No doubt this elective system is partially to blame for the events leading up to these hearings—both by creating an atmosphere where judges are accustomed to

receive money in the form of campaign contributions from potential litigants and by making it difficult for a judge to risk offending a key political supporter by refusing a gift. One of those who testified as a character witness in these proceedings stated that the Board's most appropriate response in this situation would be to cry out for the reform of the elective system. Such a reform would undoubtedly remove our judiciary from a political situation intolerably fraught with ethical conflicts, perhaps with the result that we would never again be faced with the kind of widespread public scandal that has occurred here. As Steve Traitz himself remarked with respect to Federal judges who are not enmeshed in the election process,

> "They get on the bench and the only people that can say anything to them is God."

In the final analysis, however, our judgment on whether the behavior at issue here violates the Code of Judicial Conduct cannot be changed by the fact that the political climate in which respondents are placed tends to blight the moral sensitivities which the Code demands of our judiciary. In broad terms, our task is to determine whether a judge's action in accepting $300 cash delivered in an unmarked envelope by a potential litigant is behavior that may tend to undermine his integrity in performing his adjudicative duties; if it constitutes an impropriety or appearance of impropriety that will erode public confidence in the integrity of the judiciary; whether it has conveyed to the public the impression that the giver was in a position to influence him; and whether this is a gift of the kind that will tend to reflect adversely on the respondents' impartiality. The answer to each of these questions—but most urgently to the last three—must be a resounding affirmative.

The Board cannot bury its head in the sand and ignore the very real distinction between true gifts or campaign contributions, and the acceptance of cash in unmarked envelopes with all its negative effects on the public perception of the judiciary. The receipt of cash from a potential litigant under the circumstances at issue here constitutes clear and compelling violations of Canons 1, 2 and 5(C)1 as originally charged by the Board.

SANCTIONS

The Board's reports contain complete details regarding the factual circumstances surrounding each respondent's conduct. The crucial facts for resolving the sanction issue are set forth below:

Judge Cunningham

The circumstances under which Judge Cunningham accepted the money, documented in the tape recorded conversation of December 18, 1985, were grossly improper. Most particularly, the money was accepted in the course of a conversation during which Traitz stated that he would "occasionally call [Judge Cunningham] and ask [her] for a favor," and during which she stated that "I'll remember my friends." Although the Board has made no finding that Judge Cunningham was actually aware of and entered into Traitz' intent with respect to this gift, the appearance of impropriety of this conversation is so extreme that Judge Cunningham's subsequent truthfulness with respect to her receipt of the money and her cooperation with the authorities cannot reasonably be held to mitigate its seriousness. *See, e.g., Office of Disciplinary Counsel v. Peter M. Stern,* Supreme Court of Pennsylvania, Eastern District, No. J-16-1987 (1987) at 17-18.

Judge Dempsey

Judge Dempsey received $300 from the Roofers Union under unacceptable circumstances, but did not engage in any deceitful conduct to cover up the receipt of the money. After the Roofers Union investigation was made public in February, 1986, Judge Dempsey filed a financial disclosure statement disclosing the receipt of this gift.

Judge Harris

The Board unanimously rejected Judge Harris' denial that he received any money in 1985. Accordingly, the Board has found that Judge Harris received money under improper circumstances in 1985, failed to disclose the gift on his financial disclosure statement, and lied in his testimony throughout his hearing before the Board.

Judge King

Judge King has stipulated that he received $200 cash in 1983, $200 cash in 1984, and $300 cash in 1985. Judge King failed to report the receipt of the gift on his financial disclosure form for the year 1984, the first year that such a requirement existed. As further explained in the discussion in the Board's report on Judge King, in circumstances where a judge has committed an act which on its face constitutes serious misconduct, the burden is on the judge to come forward with evidence to dispel any negative inferences from the facts if such evidence exists. In the absence of any positive showing that the failure to disclose was unintentional, the Board is justified in finding that Judge King not only received cash under improper circumstances, but also willfully violated his reporting requirements on the 1984 financial disclosure form in an effort to cover up his misconduct.

Judge Lipschutz

The Board has found that Judge Lipschutz accepted an envelope containing $500 cash from Steve Traitz during a lunch at the Riverfront Restaurant on December 10, 1985. When FBI agents interviewed Judge Lipschutz on February 13, 1986, and asked him whether he received an envelope containing $500 cash at that meeting, Judge Lipschutz's response was that he "would have to cudgel his memory as to whether he received a cash payment from Traitz, Jr., on this particular date." In addition to receiving cash under improper circumstances, Judge Lipschutz's statement to the FBI a mere two months after the event described exhibits a lack of candor to the authorities in the course of their official investigation.

Judge Porter

Judge Porter received $300 from the Roofers Union under unacceptable circumstances, but did not engage in any deceitful conduct to cover up the receipt of the money. After the Roofers Union investigation was made public in February, 1986, Judge Porter filed a financial disclosure statement disclosing the receipt of this gift.

Judge Shiomos

When interviewed by FBI agents on February 12, 1986, Judge Shiomos stated positively that he had never received any money from the Roofers Union and that "the only thing he could recall receiving from any union was possibly a Christmas card." However, Judge Shiomos testified before a Federal Grand Jury on August 1, 1986, that he received cash from the Roofers Union on at least 6 occasions including the years 1983, 1984, and 1985. The respondent not only accepted money

under improper circumstances, but lied outright to authorities in their official investigation in an effort to cover up his misconduct.

Judge Snyder

Judge Snyder received $200 cash from the Roofers Union in 1984 and $300 in 1985. He filed financial disclosure statements in both 1984 and 1985 reporting no gift. In April, 1986, after the Roofers Union investigation was made public in February, 1986, respondent filed a second financial disclosure statement for the year 1985 identical to the first but disclosing a $300 cash gift from the Roofers Union. Judge Snyder not only accepted cash under improper circumstances but, in an effort to cover up his misconduct, intentionally failed to disclose the gifts as required by law on his financial disclosure statement for 1984 and on his initial financial disclosure form for 1985.

Judge Wallace

Judge Wallace testified before the Board that he received cash from the Roofers Union in 1983 and 1985. In December, 1985, Tommy Brown delivered the cash and invited him to a Christmas party at the same time. When interviewed by the FBI on February 13, 1986, Judge Wallace at first denied knowing a "Tommy Brown." When shown Brown's picture, he admitted to knowing Brown but denied receiving any cash in December, 1985, and stated that he was invited to the Roofers Christmas party by Traitz during a phone call. Judge Wallace not only accepted money under improper circumstances, but lied outright to the FBI in its official investigation in an effort to cover up his misconduct.

Judge White

The case of Judge White is unique among these matters. In December, 1985, Tommy Brown visited Judge White's chambers and left on Judge White's desk an envelope containing $300. When Judge White later opened it and discovered the money, he used it to buy gift certificates for court personnel. Judge White was the only respondent whose instinct for what is right and proper kept him from pocketing the cash. As Judge White now agrees, the proper way of disposing of cash received in the unique circumstances that Judge White described is to return it to the giver. However, giving the money away to court personnel under the circumstances which the Board found as facts could result in minimal personal benefit to the judge. Unfortunately, Judge White's response to the FBI interview substantially amounted to providing false and misleading information to the FBI. Judge White knew that the FBI was trying to find out whether he had received money and that the question of whether the envelope was placed in his hand as opposed to his desk was not relevant to the inquiry in any way. Accordingly, a negative response to the question of whether Brown had handed him cash on the day in question was functionally indistinguishable from an intentional false statement. Moreover, Judge White's misleading statements are eloquent proof of his own consciousness that his acceptance of the cash was wrong.

On the basis of these facts, the judges who not only violated the Code by accepting cash under improper circumstances, but lied outright to the authorities in an effort to cover up their misconduct, clearly should be removed from judicial office. Such behavior not only constitutes that judge's failure to live up to Canon 1's behest that "a judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and the

independence of the judiciary may be preserved," it discredits the judiciary and reinforces the public perception that the money was accepted with a corrupt intent. Removal is the only appropriate remedy in these circumstances.

Removal is similarly appropriate in the case of Judge Cunningham, particularly in view of the extremely improper nature of her tape recorded conversation with Traitz.

With respect to former Judge Snyder, the Supreme Court has found him ineligible hereafter to hold any judicial office. *In re The Judicial Inquiry and Review Board v. Judge Bernard Snyder,* _____ Pa. _____, 523 A.2d 294 (1987). Former Judge Snyder has appealed this decision. In the unlikely event that this decision is reversed, the Board believes that its findings regarding former Judge Snyder's conduct in the present matter are sufficient to justify prohibition against any future service as a judge in the Commonwealth of Pennsylvania.

The remaining judges whose conduct was less culpable than those who improperly accepted money and lied to the authorities still have gone far beyond the creation of an appearance of impropriety; they have created the appearance of corruption in the public mind.

Respondents' contention that their removal is not warranted because Board counsel never proved that each respondent actually knew that his acceptance of a cash gift from the union created the appearance of impropriety is unavailing. A judge must be held to the standard of a "reasonable judge" with respect to actions that may tend to undermine public confidence in the judiciary. Lack of proof that the individual judge was actually aware of the appearance of impropriety should not affect the Board's judgment. The details of the

Roofers scheme, and the fact that these judges took money proffered pursuant to that scheme, are known nationwide. To recommend that no discipline or mild discipline (such as public admonishment or a short suspension) is deserved because none of these judges could be proved to have known that potential litigants who privately gave them unmarked envelopes filled with cash were trying to buy influence will do nothing but compound the existing appearance of corruption with a public perception that nothing will be done about it.

One of the Dissents suggests that removal, as the Board's ultimate penalty, should not be used without proof that the money was accepted with a corrupt intent by the individual judge. Such behavior, however, is also the subject of criminal law and would likely result in criminal prosecution and a jail term. The Judicial Inquiry and Review Board must deal with criminal conduct, but its peculiar province is to deal with those judicial improprieties that fall short of criminality because it is recognized that, in order to maintain public faith in the judiciary, judges must adhere to standards of behavior different from and more stringent than those we expect from the ordinary person.

The Board has given careful consideration to all the evidence, including reputation evidence, offered by each individual respondent. However, each respondent's violations of the Code of Judicial Conduct were so serious,[7] and the resulting lack of public confidence so

[7] Some may feel a measure of sympathy for those judges who may not in fact have thought through the implications of accepting money under these circumstances. However, short suspensions are too mild for the facts before the Board; and any significant suspension is almost harsher to the individual than removal because it leaves him or her in a limbo where it is difficult to gain a livelihood and is not significantly different with respect to the individual's concerns about social stigma or damage to reputation.

pervasive, that the Board is convinced that removal is the only result that will restore public confidence in the independence and honor of our judiciary which, in the language of Canon 1, "is indispensable to justice in our society." As the Pennsylvania Supreme Court stated in *In Re Franciscus*, 471 Pa. 53, 369 A.2d 1190, *cert. denied*, 434 U.S. 870 (1977):

> A judge or justice of the peace in fulfilling his judicial function must not only strive to insure fair treatment toward every individual who appears before him but he must also present the appearance of fairness and probity in his behavior as a judicial officer. *If that appearance falters, the confidence of the public will naturally wane. We have been entrusted by the people of this Commonwealth with the obligation to prevent such an occurrence.* (Emphasis supplied.)

Id. at 62, 369 A.2d at 1195. The Board is not dealing here with criminal sanctions that deprive the individual of his most basic human rights, his life or liberty. Rather, the issue is whether an individual should remain in an office that must symbolize integrity and impartiality if our legal system is to retain its credibility. Canon 2 makes it clear that the maintenance of the appearance of integrity is of the essence for the successful functioning of a member of the judiciary. It makes no sense to leave on the bench a judge whose own conduct has nullified one of the most basic qualifications for the job he or she holds. Removal is appropriate when the individual holding an office has, through his own actions, destroyed public belief in his honesty to the point where he has become a liability rather than an asset to the judiciary. Accordingly, the majority of the Board has found no choice but to vote for removal in every case.

Exhibit "B" Annexed to Final Report and Recommendation of the Board

Concurring and Dissenting Report of Alex Bonavitacola

BEFORE THE JUDICIAL INQUIRY AND REVIEW BOARD

COMMONWEALTH OF PENNSYLVANIA

IN THE MATTER OF

THE HONORABLE THOMAS A. WHITE
COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

Board Hearing Docket Number 116

While I concur with my colleagues on the Findings and Conclusions contained herein, I cannot join in the recommended sanction of Removal from office.

Under the circumstances of this case, I view that sanction as extreme and unduly harsh. The penalty exacted by the majority discounts completely the evidence of prior exemplary service of the Respondent.

The investigation and proof did not disclose or reveal corruption nor a course of behavior so bereft of appropriate conduct as to warrant the recommended sanction.

An equitable sanction should serve as a deterrent so that similar conduct is not excusable nor will it be condoned. It should also exact a penalty that will not depreciate the seriousness of the charges.

Removal is neither obligatory nor fair.

There is available an entire range of sanctions that would chastise, punish and exact financial penalties.

Accordingly, I dissent from the sanction portion of this Report and recommend, in lieu thereof, public censure by the Pennsylvania Supreme Court and suspension from office for one year without pay or emoluments of office.

Concurring and Dissenting Report of James M. Munley

BEFORE THE JUDICIAL INQUIRY AND REVIEW BOARD

COMMONWEALTH OF PENNSYLVANIA

J.I.R.B. DOCKET NUMBER _____

IN THE MATTER OF:

THE HONORABLE THOMAS A. WHITE
COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

Board Hearing Docket Number 119

CONCURRING AND DISSENTING REPORT

While I concur with my colleagues on the Findings and Conclusions contained herein, I do not join in the recommended sanction of Removal from office.

In my Judgment the Respondent has violated the Code of Judicial Conduct. Observance of the Canons by a Judge is essential to public confidence in the justice of the Commonwealth's Judicial system. I believe that a recommendation of discipline of the Respondent is warranted in this case.

One must be concerned in these proceedings with the danger of excessiveness due to an understandable desire to confront what is an unprecedented threat to the future

of the judicial system in the Commonwealth of Pennsylvania. The "Philadelphia Cases" have resulted in a professional and public outcry which suggest a serious decline of confidence in our judicial system.

That we must address and make appropriate recommendations in these matters is unquestioned. However we must do so in a detached and deliberate manner, avoiding overzealousness. In the "Philadelphia Cases", due process dictates that each proceeding must be analyzed and considered individually with attention to its particular totality of circumstances.

In this case it is important that we not overlook two essential elements. Firstly, in this instance the prohibitive Canons and rules, by necessity, are written with a broader brush stroke. The Respondent in this case has argued that he had little or no notice of the specifics of the conduct prohibited. Speaking in terms of our responsibility and perception, I am compelled to consider this in my recommendations to the Supreme Court. In retrospect, hindsight is often revealing, but does not give an accurate perspective in the first instance.

Secondly, it is crucial that we balance the violations of the Canons with the fact that the Respondent has served the citizens of the Commonwealth in a distinguished fashion and that until this occasion, both as a public official, as a member of the legal profession, and in private life possessed an unblemished and honorable record. To ignore the Respondent's service and these credits would constitute a singular injustice. Under the circumstances outlined above, I cannot conclude that it is just and proper for removal from office to be imposed.

It is a fundamental principle in our system of Justice that any punishment should befit the wrongdoing; that the sentence must be proportionate to the Respondent's

misdeeds. It is imperative in such undertakings that we endeavor to conform to reasonable standards when we recommend the imposition of sanctions.

The removal of a duly elected judicial officer is a matter of the gravest possible concern. In this case removal from office would constitute a degree of sanction excessive and uncalled for. Article 5 Section 18 of the Pennsylvania Constitution describes other sanctions available to the Board. These sanctions are designed to punish Judges for their misconduct and to foster overall improvement of the Judiciary within reasonable perimeters, such sanctions punish the offending party and send out a clear message that such conduct is improper and intolerable.

The majority in its opinion has commented in this case on the subject of a private interest group (the unions) and its involvement with the judiciary in Philadelphia, stating that,

> "... a judge cannot hope to win an election in Philadelphia without securing the favor of the unions." (Pg. 15).

In my opinion, this section of the majority opinion and in particular these conclusions concerning union activity and the consequent need for reform of the present method of selecting judges (Pg. 17 of Majority report) goes beyond the scope of this Board's commission. Moreover, I believe that the conclusions drawn in this regard are overly generalized and lack any degree of indepth analysis. As these cases before us deal with the acceptance of cash gifts at Christmas and not with election contributions, I fail to see how one could in good logic come to a conclusion that addresses the process of electing judges to office. The spurious argument of the majority in this regard serves primarily to render

discredit on the judiciary at large in that it suggests that the situation key to the Philadelphia cases is somehow related to the popular election of judges. This argument ignores the fact that the judiciary of this Commonwealth enjoys a reputation of outstanding distinction, the Philadelphia cases notwithstanding. I agree that there are constraints and restraints placed on the judiciary in the elective process which may require attention and reformation, but I do not agree that the present cases provide us with clear directives in that area.

The activity of all private interest groups—and they are legion—in the election process is an ongoing matter of concern and I believe more vigilant regulation of these activities is required. I am not, however, convinced that the present situation warrants the conclusion by the majority that another method of selecting judges would "... undoubtedly remove our judiciary from a political situation intolerably fraught with ethical conflicts ..." (Pg. 17).

Given the impressive history of the popular election of judges (since 1850) in this Commonwealth, it seems far more convincing to me that reform of the judiciary should proceed as it has and is proceeding, through the enactment and promulgation of laws, rules and regulations in the proper forum.

I dissent from the sanction portion of this Report and recommend, in lieu thereof, public censure of the Respondent by the Pennsylvania Supreme Court and suspension from office for one (1) year without pay or emoluments of office.

JAMES M. MUNLEY
James M. Munley

Concurring and Dissenting Report of
Judge Stephen J. McEwen, Jr.
Member of the Board

BEFORE THE JUDICIAL INQUIRY
AND REVIEW BOARD
COMMONWEALTH OF PENNSYLVANIA

IN RE:

THE HONORABLE THOMAS A. WHITE
COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

Docket No. 119

OUTLINE

- FACTS OF THE OFFENSE: THE CASH GIFT.
- NATURE OF THE OFFENSE
  - The inquiry is twofold.
  - The cash was presented and accepted as a gift.
  - The Supreme Court does not prohibit the acceptance of gifts.
  - Acceptance of the gift did create the "appearance of impropriety."
  - Appearance of impropriety distinguished from wrongful act.
  - The presumption of innocence precludes finding of wrongful act.

- The presumption of innocence reposes in free will and human nature and protects the capacity to make judgments and misjudgments.
- Misjudgment is not *mala in se.*
- Misjudgment is not *mala prohibita.*
- Board Report is a guide for future.
- A sanction is necessary.

- DISCUSSION OF THE PUNISHMENT

Factors Irrelevant to Selection of Punishment:

- Dignity of individual.
- Retribution, deterence, vengeance not valid factors.
- Itemization of specific invalid factors.
- Erosion of public confidence invalid factor.
- Demands to be overlooked.

Removal is Excessive Punishment:

- Offense neither actual or venal.
- Offense is one of appearance.
- Bad judgment.
- Jury of citizens would conclude misjudgment.
- Jury of citizens would not remove from Bench.

Removal Violates U.S. Constitution:

- Removal is "unnecessarily severe".
- Suspension achieves purposes of punishment.
- Individuals may not be the "cutting edge."
- Unpopular response cannot be a factor in dispensing justice.

- THE FURTHER OFFENSE: IMPEDING THE FBI
- CONCLUSION

FACTS OF THE OFFENSE: THE CASH GIFT

The circumstances under which Respondent received and failed to return the $300 cash gift are undisputed. Tom Brown, a former court employee, visited the Respondent's chambers for a few minutes on December 9, 1986, and placed an envelope on the corner of his desk as he left. The Respondent believed the envelope contained a Christmas card until, two or three days later, he opened the envelope and discovered three $100 bills therein. Respondent testified that:

> I was taken back by it. I was—Tom Brown, $300.00, I said no way he could afford that. And I put it back in the envelope and put it in my middle desk. I didn't know what to do with it.
>
> * * *
>
> I'd like to have given it back to Tom Brown.
>
> * * *
>
> It was sitting on my, inside my desk for another day or two. It had to be minimally overnight, if not two nights and I had bought some gifts for the office, and I thought gee I know what I'll do. I'll give them gift certificates for this money. I asked Tom Ruth to go to Wanamakers. I wrote down on a little piece of paper four $50.00, four $25.00 gift certificates, asked him to go to Wanamakers and get them for me, and he did.
>
> I gave them out to, if I remember correctly, I gave it to my secretary, I gave it to my law clerk, I gave it to my Court Reporter and I gave it to my personal.
>
> I also gave it to the court officer that ran the courtroom that I—in the motions court, and I gave it to—I had two law clerks and a secretary assigned to me for motion court and I gave the other three to them [N.T. 88-89].

Respondent testified that these gift certificates were distributed to his court personnel in addition to his usual Christmas gifts to them and in addition to the Christmas luncheon that he hosted each year for his personnel, because he "didn't want any parts of that money" [N.T. 90].

More telling, however, is Respondent's testimony in response to the following questions by the Board:

> Q. . . . Judge White, I think I just heard you testify a few minutes ago that you don't take cash gifts?
>
> A. I don't take gifts.
>
> Q. You don't take gifts?
>
> A. Not from people connected with the courts.
>
> Q. Were you sufficiently satisfied with this gift so that you were not willing to make the effort to find Tom Brown? You have already admitted that you probably could have found a way [to locate him]. Wasn't your conscience sufficiently pricked as a sitting judge to go and try and find that man and give him back the money?
>
> A. No. Because we are permitted to take gifts from my understanding. I don't believe we should, but we are. And I didn't want it. The only way I figured this is as good a way as any of getting rid of it, give it to the court personnel. And I did. Maybe I should have done something different. That's the thought from my mind.
>
> Q. How many unions do you get gifts from?
>
> A. I didn't get gifts from any unions.
>
> Q. I think you just got one from this one?
>
> A. But I did not know it at the time. If I had known it, I would have known it was connected with the union. . .
>
> Q. Three days later you knew it?
>
> A. Yes. Pardon?

Q. Three days later you have just testified you knew it?

A. That's correct. If he would have handed that to me and I would have seen what it was, I would not have accepted it. I wouldn't accept it from unions, from businesses, from banks, from anyone.

* * *

Q. But your embarrassment did not reach the point where you were willing to make the effort to find Tom Brown to return it?

A. Well, I didn't do it, that's for sure. Why exactly I don't know. I was busy, extremely busy and I didn't think it was of that paramount importance. Even though I didn't want it, I was embarrassed for it. I decided this was a good way and I gave it to my court people [N.T. 150-152].

Respondent, because of his personal beliefs, did not wish to accept the gift once he discovered what the envelope contained. He, therefore, distributed the gift to others in an attempt to disassociate himself from it. He should, he now acknowledges, have returned the gift.

II. NATURE OF THE OFFENSE

A member of the judiciary is obliged to "avoid the appearance of impropriety". Thus, the thrust of our inquiry must be two-fold: first, did Respondent fail to "avoid the appearance of impropriety"; and, second, what is the nature of the "impropriety" which might have appeared.

The undisputed fact here is that:

> Respondent failed to return, cash in the amount of $300, delivered in a plain envelope, during the Christmas season.

The further undisputed facts are that:

> There was no charge or evidence of misconduct related to the gift.

> The Canons do not prohibit a member of the judiciary from accepting a gift.

The conclusions thus follow:

> That the cash was presented as a gift.
>
> That Respondent accepted the cash as a gift.

True it is that the Canons do not prohibit a member of the judiciary from accepting a gift.[1] Moreover, the Supreme Court Statement of Financial Interest form[2] contains a specific section for itemization of only those gifts of cash of more than $200. The Canons do, however, prohibit such acts as permit "the appearance of impropriety". Thus, the proscription of the Canons extends beyond improper behavior to the prohibition of lawful acts which create "the appearance of impropriety". Therefore, while the failure to return a gift is not *per se* unlawful, when the circumstances surrounding the acceptance of a gift are such as create "the appearance of impropriety", the failure to return

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[1] Canon 32 of the Canons of Judicial Ethics, which were repealed effective January 1, 1974, provided:

> A judge should not accept any presents or favors from litigants, or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment.

[2] Item 11 on the Supreme Court of Pennsylvania Statement of Financial Interest instructs:

> List gifts of cash or property with a value of $200 or more. IF NONE, ENTER NONE.

The specific data sought is: Source of Gift, Address of Source of Gift, Value of Gift, and Reason for Gift.

Supplemental Instruction 11 states:

> GIFTS: List individual items of cash or property with a value of $200 or more which was received from one source during the prior calendar year. DO NOT list gifts received from spouse, parents, parents by marriage, siblings, children and grandchildren.

that gift is to invoke the Canons and the peril of sanction under the Canons. The circumstances surrounding the instant gift—$300 cash in a plain envelope—were such as did create "the appearance of impropriety".

Our analysis moves to a scrutiny of the nature of the impropriety that Respondent failed to avoid. The Respondent would not dispute that any system of justice is founded and rests upon the fundamental and basic requirement that it be free of undue influence. So basic and urgent is this requirement that the system must as well be free of the appearance of undue influence. The failure of Respondent to return the $300 cash delivered in a plain envelope, though it be a gift, triggers the dreadful spectre of unlawful influence, an impropriety so grave that it is to be avoided in all events and every circumstance. The impropriety here projected does not derive from inept judicial performance, nor personal shortcoming, nor social sin, nor private indiscretion. Rather, it drills deep to the very essence of the judicial function, namely, the issuance of judgments based solely upon the facts and the law, and free of the taint of influence. Even though there has been no evidence presented, nor allegation made, of *actual* impropriety related to the gift, the Respondent evidenced faulty judgment and did not "avoid the *appearance* of impropriety" when Respondent failed, under the attendant circumstances, to return the cash gift of $300.

But, it is to be emphasized, the Respondent did not perform a wrongful *act*, or commit an *actual* impropriety.

First, it is the *appearance* projected by the cash gift, and not the gift itself, that is evil. Surely, a *wrongful act* differs, not merely in quality, but in essence and character, from a lawful act which presents the

appearance of impropriety—as does, it naturally follows, the essence and character of the actor in each instance, as a result of which, it must follow that the penalty should be essentially different in the two instances.

Second, there is no more basic principle of natural law than the "presumption of innocence". As much as we revere the right to trial by jury, as proud as we should be of the need to prove guilt beyond a reasonable doubt, those protections are but reasoned, while the presumption of innocence is a mandate of the natural law. And, like every protection, the presumption of innocence is afforded to all, whether affluent or almseeker, whether prisoner or warden, whether accused, public defender, prosecutor or judge. It is, moreover, a presumption which may only be rebutted by the conclusion that Respondent has *acted* improperly, and a presumption that may not even be tested by conduct which is equivocal and has but the *appearance* of impropriety—for, otherwise, it would become "the presumption of evil".

Nor is the "presumption of innocence" incidental, collateral, subsidiary, accidental, secondary, relative, or comparative—it is, quite to the contrary, as intrinsic and essential to every man as is his free will and his human nature, the former affording the capacity to make judgments, and the latter the propensity for misjudgments. And it was just that propensity for misjudgments, one shared by all of us, that caused Respondent to accept the cash gift—the "presumption of innocence" compels the conclusion that the decision of Respondent was a lapse in proper judgment, a failure to use good judgment, and, therefore, a misjudgment.

Certainly, the failure to return the gift was not *mala in se*—the majority so acknowledges by its treatment of the payment as a gift. Nor, in my view, is it *mala prohibita*, since, I most respectfully note, those who so assert are unable to cite any statute, ordinance, rule or regulation which has been enacted, or to which Respondent has assented, outlawing acceptance of all gifts.

And, of course, were the failure to return the cash gift *mala prohibita*, were such failure so clear, apparent, and obvious a wrongful act, there would have been no need for my distinguished colleague upon the Board to proceed to the splendid thirty page opus included in the Report of the majority—an effort which required careful scrutiny of the record, decisive analysis of the facts, and thorough research of the applicable legal principles. The fact is that this articulate and persuasive dissertation is a superb presentation of the unquestionably sound and valid conclusions (1) that the acceptance of a cash gift should be banned by our Supreme Court, and (2) that acceptance by Respondent of the $300 cash gift jeopardized the integrity of himself and, indeed, the judiciary—but, this treatise was not, during the Christmas season of 1985, available for the guidance of Respondent.

In any event, all nine members of the Board have concluded that the Respondent erred. The different descriptions of the behavior of respondent[3], or the semantic difference in the description of the conclusion[4]

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[3] Whether the act of Respondent is described as (1) accepting a cash payment of $300, or (2) accepting a cash gift of $300, or (3) a failure to return a $300 cash gift.

[4] Whether the error is described as (1) presenting the appearance of impropriety, or (2) impropriety, or (3) misjudgment, is not significant.

of impropriety, or the number of canons violated[5] by the acceptance of a single gift, does not distract from the unanimous conclusion that the error of Respondent necessitates the imposition of sanction. Even while, however, all nine members of the Board agree (1) that Respondent erred, and (2) that a sanction must be imposed, a significant minority of the Board has concluded (i) that the majority recommendation of dismissal is severe and unjust, and (ii) that the fair, just and appropriate sanction, under all of the circumstances,

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[5] I differ further with the Report of the Board in that I do not agree that acceptance or failure to return the gift is a violation of Canon 5(c)(1). The Supreme Court in its opinion in In Re Dandridge, 462 Pa. 67, 73, 337 A.2d 885, 888 (1975), did say that the "prohibition against accepting improper gifts is encompassed in the language of . . . Canon 5. Subd. C(1): "A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality. . . ."

It is quite difficult to understand how a gift can be considered a financial and business dealing. The answer must be, however, in the nature of the gift which the Supreme Court addressed in Dandridge, supra, specifically, proceeds of a testimonial dinner in the amount of $23,500.

On the other hand, a gift of $300.00, however improper, can hardly be termed a financial and business dealing—which is not to say that the instant gift of $300.00 cash does not violate the Canons, since the Supreme Court in Dandridge, supra at _____, 337 A.2d at _____, in quite certain terms, declared *"More persuasively,* the present Canon 2 was clearly intended" to proscribe improper gifts (emphasis supplied).

This difference of opinion may not, however, be viewed as having any consequence upon the nature of the sanctions to be imposed, for the Supreme Court, when it selected the punishment for Judge Dandridge, restricted its consideration to the nature of the offense, and not the number of Canons violated.

And, finally, one cannot help but observe that the majority Report of the Board fails to mention that a private reprimand was the sanction imposed by the Supreme Court upon Judge Dandridge for the violations flowing from his acceptance of a gift of $23,500.

would be a suspension from duty without compensation, and the administration by the Supreme Court in public session of the sanction of a censure and reprimand. I have engaged in the foregoing exposition of my view of the essence of the offense so as to provide a rationale for my joinder with these conclusions of the minority.

III. PUNISHMENT

Factors Irrelevant to Selection of Punishment

The dignity of the individual is so compelling a notion of our jurisprudential system that any party vested with authority to impose sanctions is required to focus upon the character of the individual, as well, of course, as the nature of the offense. Such factors as retribution, deterrence and vindication require, of course, consideration of the impact of the sanction upon others than the accused. Thus, those factors have long since been repudiated as unworthy, for the law can seek no victim ... ever. Therefore, the deliberation upon the sanction to be imposed upon each respondent should not include and, necessarily must not be affected by, the following factors:

> That there is more than one respondent confronting similar charges brought by this Board.
>
> That certain other judges have been indicted by the federal government in the same investigation.
>
> That certain other judges have been identified as targets in another federal investigation involving charges of serious criminal misconduct.
>
> That all of the judges so charged, so indicted, and so targeted, have been suspended.
>
> That the cumulative effect of those suspensions has adversely affected the case inventory of the Philadelphia Common Pleas Court system.

> That the imposition by this Board of the sanction of a period of suspension for those found in violation of the Canons will compound the case inventory problem of the Philadelphia court system.

Further, the selection of the sanction should not be influenced by any assertion of an erosion of public confidence in the judiciary resulting from journalistic attention and editorial imprecation. First, consideration of such erosion would go beyond a deliberation that is restricted to the nature of the offense, the character of the accused, and the duty of the Supreme Court to maintain public confidence in the court. Second, the existence, nature or extent of such an erosion is impossible to determine and gauge; nor can it be argued that any media assessment of such an erosion is reliable.

Removal is Excessive Punishment:

I am of the view that the ultimate sanction—and surely, for Respondent, dismissal from the bench is the ultimate sanction—should be reserved for acts which result in a conviction of a crime classified as *malum in se,* or for such violations of the Canons as are *actual* and *venal.* The act here condemned does not meet these requirements since the failure of Respondent to return the $300 cash was not an *actual* impropriety, but rather a failure "to *avoid* the *appearance* of impropriety" by the failure, under the attendant circumstances, to return the cash gift.

As has been earlier noted, the determination of violation is based upon the following facts and conclusions:

> That Respondent failed to return cash in the amount of $300, delivered during the Christmas season, in a plain envelope.

That the cash was presented and accepted as a gift.

That there was no agreement or understanding that the gift would influence any case that had been, or was presently, or would be scheduled for decision by Respondent.

That there has been no allegation nor evidence, nor finding of *actual* misconduct related to the gift.

Therefore, though the impropriety which *may appear* is venal, specifically, the appearance of unlawful influence, there was no *actual* misconduct related to the gift, and the Board was reduced to the entry of a finding that the faulty judgment of Respondent was a failure "to avoid the appearance of impropriety". The ultimate punishment should be reserved for *actual* wrongful conduct, and should not be imposed for faulty judgment or for such conduct as *may* only *appear* wrongful.

If one were to assume that misjudgment, when it projects the appearance of impropriety, was cause for removal from employment, then only the infallible would have job security. Respondent, like his colleagues, certainly exercised poor—obtuse, if you will, awful, if you must—judgment. However demeaning the appellation one would apply to the failure of Respondent to return a gift of $300 cash in an unmarked envelope, that failure is not corrupt, and is certainly not deserving of dismissal.

I am convinced that a jury composed of the peers of Respondent—whether "peers" be defined as 12 citizens or 12 trial judges—would not impose upon Respondent the sanction of banishment. Those 12 individuals would not agree to remove Respondent from the bench—a position for which a life long career has made him eligible, and to which tens of thousands of voters from his county have elected him. And why? Because those citizens who were aware that the charge is not bribery,

but the "*appearance* of impropriety", would conclude that the impropriety is, in essence, and apart from the coliseum atmosphere inspired by the press, that of misjudgment—serious misjudgment, perhaps, but misjudgment, nonetheless.

Removal Violates U.S. Constitution

There is the further assertion that the sanction imposed is in violation of the Constitutional mandate of the Bill of Rights of the magnificent triumph that is our United States Constitution—specifically, Article VIII, which declares:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

As Mr. Justice William J. Brennan, Jr., in one of his essays upon the Clause, states:

> The right to be free of cruel and unusual punishments, like the other guarantees of the Bill of Rights, "may not be submitted to vote; [it] depend[s] on the outcome of no elections." "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."

Furman v. Georgia, 408 U.S. 238, 268 (1972) *quoting West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943) (Concurring Opinion of Mr. Justice Brennan).

Thus, Justice Brennan makes clear that the infliction of punishment may be so subject to political controversy, that the question of whether a sanction is appropriate is constitutionally beyond the purview of a majority of the

voters, as well as of the officials they elect. If the issue of whether a punishment is appropriate is beyond the impulse of the voters, and of the officials they elect, then certainly it is as clear as the light of day that a journalistic evaluation of punishment, however constitutionally protected, is presumptuous.

Justice Brennan, in that concurring opinion, goes far beyond a declaration that the courts, and not other institutions of the people, have been assigned the task to determine whether a punishment passes constitutional muster, and proceeds to a delineation of principles which should guide a judicial determination of whether a punishment violates the constitutional proscription. The Justice thoroughly discusses each of three principles inherent in the clause, before he addresses the fourth principle and notes:

> The final principle inherent in the Clause is that a severe punishment must not be excessive. A punishment is excessive under this principle if it is unnecessary. . . . If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive (citations omitted).
>
> * * *
>
> Although the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime, the more significant basis is that the punishment serves no penal purpose more effectively that a less severe punishment. . . .

Furman v. Georgia, supra, 408 U.S. at 279, 280 (citations omitted) (footnote omitted) (Concurring Opinion of Mr. Justice Brennan).

It is beyond argument that the punishment of banishment from the Bench is severe. The inquiry then becomes whether the punishment is "unnecessarily severe" for, if it is, the Justice says that it is excessive and a violation of the Bill of Rights. The punishment is "unnecessarily severe" if "there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted".

We next proceed to a study of the purposes for which the majority recommends banishment, and a determination of whether a significantly less severe punishment might achieve those purposes. The purposes of the recommended sanction of removal would seem to be (1) to punish the Respondent for the error committed, and (2) to restore the confidence of the citizens of Philadelphia in their judiciary.

Certainly the initial purpose of banishment is achieved by the recommended punishment of the minority, namely, a suspension from office without compensation for an extended period of time, as well as the administration by the Supreme Court of a censure and remand in a public session of that Court. As the esteemed Justice John P. Flaherty stated in *In the Matter of Arthur S. Kafrissen, Judge of the Philadelphia Municipal Court,* Supreme Court of Pennsylvania, 111 J.I.R.B. Docket:

> Yes, Judge Kafrissen, it is the most painful and difficult task this Court can exercise when it is called upon, as it is in this first instance, to publicly censure a jurist.
>
> Judge Kafrissen, you stand before this Court in disgrace, you stand not only before this Court, but you stand before your judicial colleagues whom you have betrayed. Judge Kafrissen this is a severe task for this Court to exercise.

> I would think Judge Kafrissen that you should reflect on how history will treat you when the history of Pennsylvania is written. It is enough for me to call attention to that unfortunate fact.
>
> We on this Court, and I trust the judiciary of Pennsylvania, sincerely hope that you, Judge Kafrissen, will recognize by this terrible experience, as will all jurists, that judicial impropriety will not, indeed cannot be tolerated.
>
> There are those on this Court, Judge Kafrissen, who are not satisfied that this sanction is severe enough. My view is I can fathom no more severe sanction than that which I have been called upon to administer.

And, as was expressed in *Commonwealth v. Lowe*, _____ Pa. _____, 522 A.2d 614, 617 (1987):

> [T]he Old Testament tells us that the fallen angels suffered most from the torture of their fall from glory and plummet from grace. . . . [a]nd, of course, the higher the ascent, the sharper the fall—the more precious the gift, the more shameful its loss.

Thus, some observers assert that Respondent has already been sorely punished by the shame and disgrace of his suspension from the Bench inflicted by the Supreme Court some months ago, and that the further humiliation of a public censure by the Supreme Court should make the punishment of Respondent complete. It is true that the disgrace of suspension from office is a dire penalty. Nonetheless, a further sanction is appropriate—but not, however, the termination of a career by permanent dismissal. Surely, the level of disgrace imposed by the initial suspension, a further extended suspension, and a public censure fulfills the need to punish Respondent.

The other purpose of dismissal is apparently to restore public confidence in the judiciary. Since public confidence is an exceedingly nebulous and vague notion, it is not easily subject to an analysis and evaluation. If a concept cannot be analyzed, or gauged or valued, surely, individuals and their careers should not be the cutting edge—should not be the victims—of a plan to promote the concept, however noble or desirable it may be. Our own illustrious Chief Justice Robert N. C. Nix, Jr., rejected the assertion that public confidence required the imposition of excessive punishment when he declared:

> I emphatically reject the suggestion that we ignore justice in this or any other cause in an effort to insulate the bench from criticism. Lasting faith and respect for a system will never be achieved by assuming the posture of a reed bending in the wind of public opinion. We are charged to dispense justice in each and every matter that comes to us for judgment, this commitment may never be deterred by a fear of an unpopular response to a decision.

In Re Greenberg, 457 Pa. 33, _____, 318 A.2d 740, 745 (1974) (Concurring Opinion of Justice Nix).

Certainly such an institutional development as enactment by the Supreme Court of a canon prohibiting the acceptance of all gifts would be far more purposeful in promoting public confidence than the exile of individuals from the office which has become their career. And, as has already been argued, the suspension earlier imposed, and further suspension to follow upon a public censure is quite a significant and purposeful punishment.

There is, therefore, substantial and valid argument to support the contention that the punishment of dismissal is unnecessary and thereby excessive, so that, as a result, the sanction of removal violates the constitutional prohibition against excessive punishment.

THE FURTHER OFFENSE: IMPEDING THE FBI

The testimony of respondent himself regarding the FBI interview conducted in his home in the presence of his wife, following the knock on his kitchen door by two agents, provides a very different perspective than does the concise finding of fact made by the majority. The testimony is:

> Q. Judge White, do you recall being interviewed by the FBI on February 12, 1986?
> A. Yes, I do.
> Q. And where did that interview take place?
> A. It took place in the living room of my home.
> Q. Was your wife present?
> A. My wife was present.
> Q. How did this interview come about?
> A. It was a holiday. I think it was Lincoln's Birthday. I am not sure. Courts were closed. They came to the kitchen door of my house, two FBI agents. They identified themselves. I thought they were there to question me about some sort of a federal appointment or something.
>
> I have often—not often, but maybe three times a year I have interviews with the FBI about people who are—they are doing background investigations, apparently on. So I invited them into my living room and I said something to them and they said sorry, this is something personally involving you.
>
> Q. You said something about other background interviews. Would you explain to the panel what you meant by talking with the FBI about other background interviews?
>
> A. Yes. About two months after this particular incident, I had FBI agents contact me regarding a fellow was being considered and subsequently has been made a Bankruptcy Judge in Philadelphia. They just asked me if he appeared before me and things like that, what kind of impression he made.

Q. So these other background interviews that you had with the FBI dealt with other people that were being considered for federal positions and the FBI came to talk to you about their background and qualifications. The other interviews were not about you is what I am saying?.

A. No. It was about someone being considered for some kind of appointment.

Q. They would come to you for your opinion or input as to their background or qualifications?

A. They would always say they are doing a background investigation.

Q. Okay. Do you recall the agents asking you questions about Tom Brown?

A. Yes, I do.

Q. And did you respond to their questions directed to you about Tom Brown?

A. Yes, I did.

Q. And did they ask you any questions about Tom Brown being in your chambers in December of '85?

A. Yes, they did.

Q. And how did you respond, Judge White?

A. I said yes, Tom Brown was in my office. They had said something to me about Judge Braig, at the same time as Judge Braig. I said yes, Tom Brown and Judge Braig were both in my offices in December of 1985.

Q. Did you every deny that Tom Brown was in your office in December of '85?

A. No, I did not.

Q. And was your wife, Edna, present during the interview?

A. My wife was sitting in the same room, yes.

Q. There was no question in your mind, Judge, that you told the agents and admitted to the agents that Tom Brown had been in your chambers in December of '85?

A. No question whatsoever.

Q. How long did the interview take place? Do you remember?

A. I would say approximately ten minutes.

Q. Did you provide any false information to the agents as to whether Tom Brown had been in your chambers in December of '85?

A. No, I did not.

Q. Did the agents or one of the agents ask you any questions about what happened when Tom Brown was there in your office?

A. He asked me did Tom Brown hand me $300.00?

Q. How did you respond to that question?

A. I said no he had not.

Q. Had Tom Brown handed you $300.00 in your chambers?

A. No, he did not.

Q. He had placed the envelope—an envelope on the desk?

A. He placed an envelope on my desk, which later I found out contained money.

Q. When Tom Brown was in your office in December of 1985 for the first time, you didn't realize or know that the envelope he placed on your desk contained money?

A. I thought it was a Christmas card.

Q. So it's correct that Tom Brown did not hand you $300.00, correct?

A. He did not hand me $300.00.

Q. Did you believe that you were giving a false statement or providing false information to an FBI agent?

A. Absolutely not.

Q. Did you intend to—

A. I—

Q. —deceive or mislead agents in your house at that time?

A. I did not.

Q. The second time he said something to the effect he didn't hand you an envelope with $300.00. The first time he said $300.00. The second time he said did he hand you an envelope with $300.00?

A. I said no he did not. I was not—I answered his question the way he asked it.

Q. As he asked it?

A. As he asked it. I probably should have been more forthright with him but—

Q. Did you intend to answer the question as asked?

A. I answered the question as it was asked.

One must conclude from the testimony of the Respondent himself that he was not candid, and was not forthright.[6] It also appears from the testimony of Respondent that the agents failed to complete the circle of questions that would have required Respondent to either tell the full truth, or to lie. Respondent did neither.

Nonetheless, as the respondent himself concedes, he should have been forthright, and he was not. It is no excuse that he did not impede the FBI investigation since the FBI already knew Tom Brown had delivered an envelope. However annoyed at the time, place, and circumstances which the agents selected to conduct their inquiry, such perceived shortcomings cannot justify misleading a law enforcement agency engaged in the lawful conduct of an investigation.

Respondent subsequently attempted to mend the error and advised the federal authorities that he wished to fully cooperate with their investigation, by providing a revised statement to the FBI, and appearing before the grand jury as a cooperative witness. The federal government failed to accept the offer of Respondent to

[6] The FBI apparently did not record the interview, but relied upon a summary dictated the following day.

provide a supplementary statement, but did call upon Respondent to present testimony to the grand jury where, it is not disputed, Respondent spurned his constitutional privilege against self incrimination and testified fully and completely.

It would, therefore, appear that the failure of Respondent to be forthright was not a studied decision to pursue a course of deception and defiance of the federal investigation, but rather, that his failure was a lapse.

In summary then, the failure of Respondent to be forthright was error, and was wrongful under the Canons. Nonetheless, the violation is not of a venal nature. Thus, the recommendation that Respondent be removed from the Bench is far, far too severe a sanction.

V. CONCLUSION

The discussion portion of the report of the majority is an exceptionally compelling statement of the fact that the systems of justice we enjoy in this country are founded upon an absolute need for the judiciary to be, and to appear to be, impartial. Upon an examination of the majority report, even the disinterested would heed the call to do good, and the summons to avoid evil. No one would deny its premises and conclusions—certainly all the members of the minority join in the declarations of the majority, and the conclusion that there has here been a violation of the Code of Judicial Conduct.

Nonetheless, the punishment is so excessive as to be unnecessarily severe. Surely, the decision of the Supreme Court in *In re Dandridge*, 462 Pa. 67, 337 A.2d 885 (1975), would so indicate, for there, the Supreme Court did not suspend the respondent, but instead imposed a sanction of *private admonition* even though the Court had found that Judge Dandridge had engaged in the

"improper conduct of accepting a large gift [$23,500] from lawyers and potential litigants [which] was clearly forbidden by the terms of the Canons of Judicial Ethics which were in effect at the time the violation occurred." *Id.* at _____, 337 A.2d at 889.

And, as on the day of final judgment, should not darkness be reserved for those who have sinned in deed, and should not those who have sinned in but appearance, though transgressors deserving of punishment, be saved from permanent banishment?

This concurring and dissenting statement conveys my views upon the error of Respondent, as well as upon the punishment to be meted for that error. This text cannot, however, portray the depth of my conviction that the recommended sanction of the majority is excessive and severe, since to dismiss Respondent from the Bench is to thrust him into lifetime exile from the peers and practitioners among whom he had achieved a reputation for professional excellence, is to eternally stigmatize appellant and his family for a misjudgment which, by sanction of removal, is made to appear heinous, and is to make him an outcast without opportunity or hope of redemption.

And so it is that I proceed to:

Join in the view of the minority that the recommendation of removal from the Bench is too severe and is unjust.

Join in the recommendation of the minority that the Pennsylvania Supreme Court administer in public session a censure and remand of Respondent.

Join in the recommendation of the minority that the Respondent be suspended from judicial office without compensation.

Recommend that the term of suspension be for a period of less than one year.

AMENDMENT XIV

* * *

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CANON 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interest of others; nor should he convey or knowingly permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

* * *

CANON 5

A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties

* * *

C. **Financial Activities**

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(2) Subject to the requirement of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a family business.

RULE 24. Emergency Interim Suspension Orders and Related Relief

(a) Incident to a preliminary investigation conducted pursuant to Rule 1 of these Rules or during a formal proceeding conducted pursuant to Rule 2 of these Rules, the General Counsel, with the concurrence of a reviewing member of the Board [as selected by the Board], may, upon their determination that the continued service of a judge is causing immediate and substantial public harm and an erosion of public confidence to the orderly administration of justice, which conduct appears to them to be a violation of the Code of Judicial Conduct or the Rules Governing Standards of Conduct of District Justices, petition the Supreme Court for injunctive or other appropriate interim relief, including temporary suspension or reassignment of the judge.

(b) A copy of the petition shall be personally served upon the respondent-judge by the Board's General Counsel contemporaneously with the filing of the petition with the Supreme Court.

(c) Within ten days after such service, the respondent-judge may file an answer to the petition with the Supreme Court and General Counsel for the Board.

(d) Following the ten-day response period, and after consideration of such response, the Supreme Court may issue such orders to the respondent-judge as may be necessary. Such orders of the Supreme Court may require temporary suspension of the performance of judicial duties by the respondent-judge or such other relief as may be deemed appropriate pending further definitive action under Rules 1 and/or 2 of these Rules.

(e) The respondent-judge may at any time petition the Supreme Court for dissolution or amendment of an order of temporary suspension or other relief issued pursuant to this Rule. A copy of the petition shall be served upon the Board's General Counsel.

(f) Within ten days after such service, the General Counsel for the Board may file an answer to the petition with the Supreme Court and serve a copy of such answer upon the respondent-judge.

(g) Following the ten-day response period, and after consideration of such response, the Supreme Court may modify or dissolve its order as it deems appropriate under the circumstances.

(h) A respondent-judge who is subject to an order issued pursuant to this Rule may request an accelerated disposition of the charges which form the basis of the said order by filing a notice with the General Counsel of the board requesting accelerated disposition. Within thirty (30) days after the filing of such notice, the board shall complete any investigation conducted pursuant to Rule 1 of these Rules and decide whether to proceed with formal proceedings in accordance with Rule 2 of these Rules, if the same has not already been filed. In the event that formal proceedings are instituted pursuant to Rule 2, the matter shall be assigned to a hearing committee for accelerated disposition. Thereafter, the matter shall proceed and be considered by the hearing committee and the Board without appreciable delay. On motion of the respondent-judge, the board, in disposing of matters submitted for accelerated disposition, may reduce the number of days provided by these Rules for filing exceptions and scheduling oral arguments thereon.

(i) Recommendations for emergency orders and related relief made by the Board's General Counsel, the Board or a judge to the Supreme Court under this Rule shall not constitute a determination under Rule 16, nor shall action taken under this Rule require the filing of a record with the Supreme Court as contemplated by that Rule. All papers filed with, and proceedings before, the Board and Supreme Court under this Rule shall be, and remain, confidential but shall be made part of the record which may be filed with the Supreme Court as contemplated in Rule 20 when the Board takes final action in a matter as provided in Rule 16 of these Rules.

Adopted and effective Dec. 5, 1986.

Art. 5, §17 Pennsylvania Constitution

* * *

§17. Prohibited activities

* * *

(c) No justice, judge or justice of the peace shall be paid or accept for the performance of any judicial duty or for any service connected with his office, any fee, emolument or perquisite other than the salary and expenses provided by law.

Notice of Appeal

IN THE SUPREME COURT
OF PENNSYLVANIA
EASTERN DISTRICT

RECEIVED
JUN 16 1988
SUPREME COURT
EASTERN DISTRICT

In the Matter of the
Honorable Thomas A. White,
Judge of the Court of Common
Pleas of Philadelphia County

Appellant

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that the Honorable Thomas A. White, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final Opinion order of the Supreme Court of Pennsylvania dated February 25, 1988, ordering Appellant removed from judicial office, and from the Order of the Pennsylvania Supreme Court dated March 29, 1988, denying reargument.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

William P. Murphy

JAMES E. BEASLEY
WILLIAM P. MURPHY

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(215) 665-1000

Counsel for Appellant

CERTIFICATE OF SERVICE

I, William P. Murphy, hereby certify that a true and correct copy of the foregoing Notice of Appeal to the United States Supreme Court has been served upon Robert L. Keuch, Esq., Executive Director and General Counsel, Judicial Inquiry and Review Board, 225 Market Street, Harrisburg, PA 17101, by placing same in the United States mail, postage prepaid, and addressed as above-stated.

William P. Murphy

WILLIAM P. MURPHY